Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RICHARD SANDHAUS a/k/a DICK SANDHAUS, and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Petitioners,

vs.

STEPHEN WEINREICH,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is fundamental due process violated where the district court pierced the corporate veil based on plaintiff's post-trial request for this equitable relief, even though plaintiff never sought veil-piercing (i) in his complaint; (ii) in any pre-trial motion; (iii) in the pre-trial order which superseded the complaint; or (iv) at trial?

2. Under Fed. R. Civ. P. 15(b), can a claim, such as veil-piercing, be deemed to have been tried by implied consent where evidence relevant to the unpled claim is admitted on an unrelated factual issue?

LIST OF PARTIES

The parties to the proceedings below were those listed in the caption above.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Second Circuit's opinion conflicts in principle with decisions of the majority of circuits.	7
II. The Second Circuit erred on a recurring issue of fundamental legal and constitutional importance.	9
III. The fundamental importance of the issue to the judicial system warrants this Court's exercise of its supervisory jurisdiction to set a clear standard.	10
Conclusion	12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Berkey v. Third Avenue Railway Co., 244 N.Y. 84 (1926) 11

Campana v. Eller, 755 F.2d 212 (1st Cir. 1985) 8

Canal Ins. Co. v. First Gen. Ins. Co., 889 F.2d 604 (5th Cir. 1989) 4

Cook v. City of Price, Utah, 566 F.2d 699 (10th Cir. 1977) 8, 9

David v. Glemby Co., Inc., 717 F. Supp. 162 (S.D.N.Y. 1989) 10

In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) 8

International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977) 8

Jimenez v. Tuna Vessel "Granada", 652 F.2d 415 (5th Cir. 1981) 9

Joseph Mfg. Co. v. Olympic Fire Corp., 986 F.2d 416 (10th Cir. 1993) 4

Lally v. Catskill Airways, Inc., 198 A.D. 2d 643, 603 N.Y.S. 2d 619 (3d Dep't 1993) 10

Contents

	Page
MBI Motor Co., Inc. v. Lotus/East, Inc., 506 F.2d 709 (6th Cir. 1974)	8
Morris v. New York State Department of Taxation and Finance, 82 N.Y. 2d 135, 603 N.Y.S. 2d 807 (1993)	4
Pariser v. Christian Health Care Systems, Inc., 816 F.2d 1248 (8th Cir. 1987)	8
Petree v. Victor Fluid Power, Inc., 831 F.2d 1191 (3d Cir. 1987)	4
Ramirez Pomales v. Becton Dickinson & Co., 839 F.2d 1 (1st Cir. 1988)	4
Trinity Carlton Co., Inc. v. Falstaff Brewing Corp., 767 F.2d 184 (5th Cir. 1985)	8
United States v. Hurwitz, 573 F. Supp. 547 (S.D.N.Y. 1983)	11
Walkovszky v. Carlton, 18 N.Y. 2d 414, 276 N.Y.S. 2d 585 (1966)	5
Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc., 833 F.2d 1484 (11th Cir. 1987)	7, 8
Statutes Cited:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332(a)(1)	2

Contents

Page

United States Constitution Cited:

Fifth Amendment 2

Rules Cited:

Federal Rule of Appellate Procedure 41(b) 2

Federal Rule of Civil Procedure 15(b) .....i, 3, 6, 9, 11, 12

Federal Rule of Civil Procedure 16(e) 4

Other Authorities Cited:

Arthur D. Hellman, *Error Correction, Lawmaking and the Supreme Court's Exercise of Discretionary Review,* 44 Univ. of Pitt. L. Rev. 795 (1983) 10

Presser, Commentary: *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics,* 87 Nw. U.L. Rev. 148 (1992) 11

Richard H. Silberberg and Robert Manson *"Morris" Fortifies the Corporate Veil,* N.Y.L.J. (April 12, 1994) 5

Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study,* 76 Cornell L. Rev. 1036 (1991) 11

Contents

Page

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Second Circuit Staying Mandate, Dated July 19, 1995 ..... 1a

Appendix B — Judgment, Order and Opinion of the United States Court of Appeals for the Second Circuit, Dated June 8, 1995 ..... 3a

Appendix C — Judgment of the United States District Court for the Southern District of New York, Dated July 29, 1994 ..... 6a

Appendix D — Opinion of the United States District Court for the Southern District of New York, Dated June 30, 1994 ..... 8a

Appendix E — Opinion of the United States District Court for the Southern District of New York, Dated April 28, 1994 ..... 17a

Appendix F — Opinion of the United States District Court for the Southern District of New York, Dated July 24, 1989 ..... 54a

No.

In The

Supreme Court of the United States

October Term, 1995

RICHARD SANDHAUS a/k/a DICK SANDHAUS, and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Petitioners,

vs.

STEPHEN WEINREICH,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Richard Sandhaus, Dick Sandhaus Productions, Inc., and Science Faction Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions below in reverse chronological order are as follows: the opinion of the United States Court of Appeals for the Second Circuit, dated June 8, 1995, affirming the district court is unreported, and reproduced in the Appendix at 3a. The post-trial opinion of the United States District Court for the Southern District of New York, dated June 30, 1994, is reported at 156 F.R.D. 60 (S.D.N.Y. 1994), and reproduced at 8a. The district court's opinion on the bench trial, dated April 28, 1994, is reported at 850 F. Supp. 1169 (S.D.N.Y. 1994), and reproduced at 17a. The district court's pre-trial opinion, dated July 24, 1989, granting partial summary judgment, is officially unreported, but found at 1989 WL 130641 (S.D.N.Y.) and 1989 U.S. Dist. LEXIS 8424, and reproduced at 54a.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1) as the parties are citizens of different states. The district court entered its judgment on July 29, 1994. The Second Circuit entered its judgment affirming the district court on June 8, 1995. No mandate issued, however, because the Second Circuit granted petitioners' motion for a stay under F.R.A.P. 41(b) which requires a showing that a petition for certiorari raises "a substantial question." The Second Circuit entered the stay order on July 19, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

Fed. R. Civ. P. 15(b) provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

STATEMENT OF THE CASE

Plaintiff commenced this diversity action against defendants Richard Sandhaus, Dick Sandhaus Productions, Inc. ("DSPI") and Science Faction Corp. ("SFC") on May 23, 1983.[1] Richard Sandhaus is the sole shareholder of the two corporate defendants.

Plaintiff alleged a joint venture, breach of contract and *quantum meruit* against all three defendants. Plaintiff incorporated in the complaint a letter agreement providing he was entitled to a third of the net profits of the laser system then currently in production. SFC did not exist at the time the letter agreement was signed. Defendants denied the existence of the contract, and denied plaintiff was entitled to further compensation in *quantum meruit.*

Following six years of discovery, defendants moved for summary judgment. Then district judge Charles E. Stewart, Jr. construed the complaint as alleging three causes of action for joint venture, a fourth for breach of contract, and a fifth for *quantum meruit.* He granted partial summary judgment dismissing the joint venture claims.

---

1. Plaintiff also sued Science Faction Systems. This party was dismissed, without objection, because there was never any such entity. *Weinreich v. Sandhaus*, 1989 WL 130641 at 6 (S.D.N.Y. 1989) (Stewart, J.).

In the fourth cause of action, plaintiff alleged that defendants "did fail to exercise ordinary care and did negligently maintain their records and fail to pay plaintiff" a third of net profits from the laser light show business. Finding the complaint was "not a model of clarity," Judge Stewart ruled this allegation could be read to state a claim for breach of contract.

The complaint did not contain any claims for corporate veil piercing, and the district court did not find any. Rather, the causes of action which remained were that: (i) plaintiff had a direct contractual relationship with all three defendants which they breached; and (ii) plaintiff was entitled to recover against each defendant in *quantum meruit*.

Discovery and related motion practice continued for four more years. No discovery was ever taken on the issue of veil piercing. In November of 1993, district judge Robert W. Sweet signed a fifty page pre-trial order in which plaintiff alleged two causes of action: breach of contract and *quantum meruit*. The pre-trial order superseded the complaint and governed the claims that went to trial.[2] Nowhere in the document was the issue of veil piercing ever mentioned.

The New York Court of Appeals has declared that, to pierce the corporate veil under New York law, the plaintiff must prove three essential elements: (i) domination of one or more corporations; (ii) for personal and not corporate purposes; and (iii) use of that domination to commit a fraud against the plaintiff. *Morris v. New York State Department of Taxation and Finance*, 82 N.Y. 2d 135, 603 N.Y.S. 2d 807 (1993).[3]

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2. Fed. R. Civ. P. 16(e); *see Joseph Mfg. Co. v. Olympic Fire Corp.*, 986 F.2d 416 (10th Cir. 1993); *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604 (5th Cir. 1989); *Ramirez Pomales v. Becton Dickinson & Co.*, 839 F.2d 1 (1st Cir. 1988); *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987).

3. Notably, New York does not permit veil piercing based simply on a (Cont'd)

The complaint was silent regarding any of these elements of veil-piercing much less all three. Likewise, none of the elements were ever discussed in extensive pre-trial motion practice, including two motions for summary judgment.

The action finally went to trial nearly eleven years after the complaint was filed. Trial took place before Judge Sweet over ten days. In his opening statement, plaintiff's counsel reiterated that his claims were for breach of contract and *quantum meruit.* In his opinion, Judge Sweet found, *inter alia,* that: (i) the letter incorporated into the complaint was an enforceable agreement between plaintiff and DSPI only; and (ii) DSPI had no net profits.

In his post-trial brief, plaintiff requested for the first time that the district court pierce the corporate veil to reach the assets of SFC and Mr. Sandhaus personally. The district judge obliged, and awarded plaintiff damages from the profits earned by SFC. The corporate veil was pierced simply because DSPI was by then dormant, and Mr. Sandhaus was the president and sole shareholder of both corporations.

The district court cited to evidence introduced by both sides to support the veil-piercing. However, all this evidence related to breach of contract or *quantum meruit.* Plaintiff's evidence related to the safety and design of one laser light system, which defendants contended plaintiff had designed defectively.

(Cont'd)
showing that the corporation is an "alter ego" or "instrumentality" of a dominant shareholder, notwithstanding the courts' broad powers in equity. Rather, there must be proof of shareholder dominance for the purpose of committing a fraud. *See* Richard H. Silberberg and Robert Manson *"Morris" Fortifies the Corporate Veil*, N.Y.L.J. (April 12, 1994), p. 1 *et seq.* Indeed, the corporate veil may not be pierced where the corporation has no assets to pay a judgment, even if it was structured precisely for that purpose. *Walkovszky v. Carlton*, 18 N.Y. 2d 414, 276 N.Y.S. 2d 585 (1966).

Defendants' evidence was introduced solely in support of their defenses that: (i) neither Mr. Sandhaus nor SFC was a party to the letter agreement between plaintiff and DSPI; and (ii) income from the laser system which earned a profit was not attributable to DSPI because that system was developed by SFC.

The district court made no finding whatsoever that the veil-piercing claim was tried by express or implied consent under Fed. R. Civ. P. 15(b). Accordingly, the district court neither addressed nor ruled on the threshold issue of due process, as the issue did not develop until after the district court issued its opinion.[4]

On appeal, the due process violation was presented as the threshold issue. Defendants SFC and Mr. Sandhaus argued that, by ruling against them on a theory never pled nor tried, the district court violated procedural due process, relying on precedent from other Circuits. Plaintiff conceded the veil-piercing issue was never pled nor tried by express consent, but argued that the evidence cited by the district court demonstrated a tacit finding by the district court that the veil-piercing issue had been tried by implied consent.

The Second Circuit did not address this argument in its opinion. Rather, the court simply affirmed "for substantially the same reasons expressed in the decision of the district court."

Hence, the Second Circuit refused to apply the principle clearly established in seven other Circuits that, to protect due process, trial of a claim by implied consent will be found only where the evidence admitted related *solely* to the unpled issue, and was irrelevant to any other issue already raised in the pleadings.

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4. Thereafter, the district court issued a post-trial opinion increasing the damage calculation.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S OPINION CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE MAJORITY OF CIRCUITS.

In *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484 (11th Cir. 1987), the Eleventh Circuit was faced with a very similar set of facts to the case at bar. Plaintiff brought a claim against a corporate defendant and its sole shareholder alleging trademark infringement, unfair competition and breach of a sales contract. However, the breach of contract claim was alleged against the corporate defendant only, and not against the shareholder.

The district court pierced the corporate veil and entered judgment against both the corporate defendant and its shareholder on the contract claim. The Eleventh Circuit reversed, ruling that, although there was sufficient evidence to pierce the veil under Florida law, no veil-piercing claim was in the case. Notably, the Eleventh Circuit rejected plaintiff's claim that the veil-piercing claim was tried by implied consent, holding:

> A party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial.

Id. at 1487.

The court further held that, although the veil-piercing evidence "might" have been relevant to another claim in the

complaint, there was no implied consent because "[t]he introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case." *Id.*

The First, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have all adopted similar tests for implied consent. *Campana v. Eller*, 755 F.2d 212, 215 (1st Cir. 1985) ("The test of consent to the trial of an issue is whether a party permitted the introduction of evidence which was relevant only to that issue"); *Trinity Carton Co., Inc. v. Falstaff Brewing Corp.*, 767 F.2d 184, 193 (5th Cir. 1985)("Trial by consent may not be deemed where evidence concerning the issue that is maintained to have been thusly tried is also relevant to other issues that in fact have been pleaded and tried, at least in the absence of clear notice that such issue was being raised"); *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977) ("The introduction of evidence relevant to an issue already in the case may not be used to show consent to the trial of a new issue absent a clear indication that the party introducing the evidence is attempting to raise a new issue"); *MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974) ("Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue"); *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987) (evidence introduced that was relevant to unpled claim "was also relevant to [plaintiff's] other claims, so its introduction did not provide the defendant with any notice that [the unpled] claim . . . was being tried"); *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) ("Where evidence alleged to have shown implied consent was also relevant to the other issues at trial, it cannot be used to imply consent to try the unpleaded issue" [internal punctuation omitted]); *Cook v. City of Price, Utah*, 566 F.2d 699 (10th Cir.

1977) ("When evidence claimed to show trial of an issue by consent pursuant to Rule 15(b) is relevant to a separate issue already in the case, it would be unjust to the opposing party to consider a new theory of recovery after trial is complete").

Here, the Second Circuit found implied consent from the unchallenged admission of evidence that equally related to the contract issues properly in the case. The Second Circuit's decision was contrary in principle to the standard established by seven other Circuits. Thus, the Court should grant certiorari to give guidance to the lower courts regarding the requirements of implied consent and procedural due process under Rule 15(b).

II.

THE SECOND CIRCUIT ERRED ON A RECURRING ISSUE OF FUNDAMENTAL LEGAL AND CONSTITUTIONAL IMPORTANCE.

Adjudication of an unpled cause of action by post-trial ambush, as occurred here, not only contravenes the Federal Rules of Civil Procedure, it violates fundamental principles of due process. As the Fifth Circuit stated:

> [E]ach party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere.

Jimenez v. Tuna Vessel "Granada", 652 F.2d 415, 420 (5th Cir. 1981).

Clearly, a defendant would prepare and offer different proof to defend against a claim that he was a direct party to a contract

than he would to a claim that he was liable for another party's contract on a corporate veil-piercing claim. Hence, if the defendant does not have notice of the veil-piercing claim, he cannot possibly have been given an adequate opportunity to defend.

III.

THE FUNDAMENTAL IMPORTANCE OF THE ISSUE TO THE JUDICIAL SYSTEM WARRANTS THIS COURT'S EXERCISE OF ITS SUPERVISORY JURISDICTION TO SET A CLEAR STANDARD.

It has been said that the function of the appellate court is:

> to announce, clarify, and harmonize the rules of decision employed by the legal system which it serves. Included within this role is the function of resolving conflicts among the decisions of those lower courts subordinate to the appellate court so that the law is evenhandedly applied within the system.

Arthur D. Hellman, *Error Correction, Lawmaking and the Supreme Court's Exercise of Discretionary Review,* 44 Univ. of Pitt. L. Rev. 795 (1983).

The business of American courts is dedicated in large part to commercial litigation. In such cases, shareholders relying on the protections of limited liability must be solidly on notice that the corporate tissue is under attack. Piercing the corporate veil is an equitable cause of action that should be pled and proven, *see, e.g., Lally v. Catskill Airways, Inc.*, 198 A.D. 2d 643, 603 N.Y.S. 2d 619, 621 (3d Dep't 1993), *David v. Glemby Co., Inc.*, 717 F. Supp. 162, 165 (S.D.N.Y. 1989), and not simply raised after trial as a

convenient mechanism to assure the plaintiff there will be a pocket from which to recover.

The law has long recognized that: (i) limited liability is the essential benefit of doing business in the corporate form; and (ii) the limited liability principle is both economically sound and a fundamental tool of democracy. *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84 (1926) (Cardozo, J.); Presser, Commentary: *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U.L. Rev. 148, 155-57 nn. 32-34, 163 (1992). As one noted commentator has observed:

> Limited liability is a presumptive rule of law that facilitates the development of public markets for securities, permits the allocation of risk or benefits between parties, and supports the certainty of planning by those who have organized the corporation.

Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1073 (1991).

Precisely because shareholders are protected by the corporate form, veil-piercing claims are common in commercial litigation. On average, the federal and state courts throughout the nation pierce the corporate veil in forty percent of the cases in which the claim is raised. *Id.* at 1048-49, 1052.

Moreover, the Second Circuit adjudicates cases from New York, which the courts have recognized as the commercial center of the nation. *See, e.g., United States v. Hurwitz*, 573 F. Supp. 547 (S.D.N.Y. 1983). Permitting the Second Circuit to depart in principle from seven other Circuits in its treatment of implied consent under Rule 15(b) — particularly as it impacts on commercial cases — would be deleterious to the sound administration of the law.

Due process demands that every litigant be on notice of the claims against him or her, and not be surprised with new theories of liability raised after trial. The Second Circuit's implicit departure from the stricter interpretation of implied consent under Rule 15(b) by other Circuits warrants review by this Court.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT STAYING MANDATE, DATED JULY 19, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7555; 94-7913

WEINREICH

V.

SANDHAUS

NOTICE OF MOTION
for Stay of Mandate

MOTION BY:

Samuel A. Abady, Esq.

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New York, New York 10022

Has consent of opposing counsel:
A. been sought? *yes*
B. been obtained? *no*

Has service been effected? *yes*

Argument date of appeal:
June 5, 1995

Judge whose order is being appealed:
Robert W. Sweet

Appendix A

Brief statement of the relief requested:
Stay of mandate pending Petition for Writ of Certiorari

s/ Samuel A. Abady
Attorney for Defendant

Appearing for:
Sandhaus, DSPI & SFC

Date: *6-28-95*

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is *granted*

s/ Wilfred Feinberg
s/ Roger J. Miner
s/ José A. Cabranes
Circuit Judge

APPENDIX B — JUDGMENT, ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 8, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7555
94-7913

STEPHEN WEINREICH,

Plaintiff-Appellee-Cross-Appellant,

v.

RICHARD SANDHAUS, also known as Dick Sandhaus, SCIENCE FACTION CORPORATION; and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants-Appellants-Cross-Appellees.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of June, one thousand nine hundred and ninety-five.

PRESENT:

HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. JOSÉ A. CABRANES,
Circuit Judges.

Appendix B

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Appeal and cross-appeal from a judgment entered in the United States District Court for the Southern District of New York (Sweet, J.), the district court having determined that the defendants had breached a contract with plaintiff and having awarded money damages for the breach.

Stephen Weinreich commenced this action against defendants Richard Sandhaus, Science Faction Corporation ("SFC"), and Dick Sandhaus Productions, Inc. ("DSPI"), alleging that he was owed money as a result of a letter agreement between the parties. In November of 1977, Sandhaus, Weinreich, and a third individual agreed to work together in the production of laser light show systems. They began work on the development of a system — known as the "Silver System" — to be used in an upcoming tour for a major rock group.

In May of 1978, after work had begun on the project, Weinreich entered into a letter agreement with Sandhaus, who was acting in his capacity as an officer of DSPI, a corporation controlled by him. The agreement provided that "all design work done by Stephen Weinreich for [the Silver System] is for consideration of a 33 1/3% interest in the net profit earned by sale or rental of this or similar or derivative systems." Although the Silver System proved unsuccessful, Weinreich continued to work with Sandhaus on other laser light show projects.

Appendix B

In June of 1978, Sandhaus formed SFC, and SFC acquired the Silver System from DSPI. SFC, as well as DSPI, was controlled by Sandhaus. SFC's ledger reflects that it paid $9,000 for the Silver System, although defendants were unable to produce a corresponding ledger entry for DSPI. Then, in November of 1978, Weinreich and Sandhaus collaborated on the creation of the "2000 System," which was more successful than the Silver System and was used through December of 1986. After the 2000 System was developed, the defendants developed a third system, known as the "360 System."

Weinreich never received any part of the profits earned by the laser light systems, and he brought this action to recover his share of those profits. He contended that the 2000 and 360 Systems were "derivative" of the Silver System and that, under the letter agreement, he was entitled to one third of the profits generated by them. After a bench trial, the district court determined that the letter agreement was an enforceable contract and that Weinreich was entitled to one-third of the net profits generated by the Silver System and the 2000 system. The district court awarded Weinreich $89,824.57 plus interest.

We affirm the judgment substantially for the reasons expressed in the decision of the district court dated April 28, 1994, *Weinreich v. Sandhaus*, 850 F. Supp. 1169 (S.D.N.Y. 1994), and the decision amending the judgment dated June 30, 1994.

s/ Wilfred Feinberg
HON. WILFRED FEINBERG,

s/ Roger J. Miner
HON. ROGER J. MINER,

s/ José A. Cabranes,
HON. JOSÉ A. CABRANES,
Circuit Judges.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 29, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (RWS)

No. 94, 1589

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

JUDGMENT

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff Stephen Weinreich recover of the defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc. the sum of $89,824.57 plus pre-judgment interest of $88,050.64 for a total judgment of $177,875.21.

IT IS FURTHER ORDERED, AND ADJUDGED that defendants' motion to amend to correct arithmetical error,

defendants' second motion to amend findings of fact and conclusions of law, plaintiff's motion for sanctions, and Plaintiff's motion to reargue are denied.

New York, New York
July 29, 1994
Date

s/ Kimba M. Wood
Kimba M. Wood, U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JUNE 30, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (RWS)

STEPHEN WEINREICH,

Plaintiff,

- against -

RICHARD SANDHAUS, a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

OPINION

APPEARANCES:

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Appendix D

Sweet, D.J.

Plaintiff Stephen Weinreich ("Weinreich") and defendants Richard Sandhaus ("Sandhaus"), Science Faction Corporation ("SFC") and Dick Sandhaus Productions, Inc. ("DSPI") (collectively the "Defendants") have brought various motions concerning the April 28, 1994 Opinion (the "Opinion") which set forth this Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). For the reasons that follow, the Opinion is amended. In all other respects, the parties' motions are denied. Judgment shall be entered on the complaint in the amount of $89,824.57 with interest and costs.

Prior Proceedings

This action was tried before the Court for ten days, from January 5 to January 18, 1994. Thereafter, the parties made further submissions, concluding on April 22, 1994. The Opinion of April 28, 1994 followed. Familiarity with this Opinion and all prior proceedings is presumed.

On June 15, 1994, the Court heard oral argument on the parties' various motions, at which time they were deemed fully submitted.

I. *Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law and Judgment*

Plaintiff has moved pursuant to Fed. R. Civ. P. 52(b) to amend the findings of fact, conclusions of law and judgment. Although the Opinion did contain findings of fact and conclusions of law, it was not a judgment. While plaintiff's motion is premature, it nonetheless may be considered. *See* 9 Wright & Miller, *Federal Practice and Procedure*, § 2582.

However, Fed. R. Civ. P. 52(b) does not permit a "party who failed to prove his strongest case . . . a second opportunity by moving to amend. . . . " *Id.*

Weinreich contends that the evidence established additional uses of the 2000 Systems after the summer of 1982, relying upon exhibits that indicate that for certain shows after this time the 2000 Systems were used, while for other shows the 360 Systems were used. *Compare* Exs. 41 and 42 ("SFC Model" designation). For many of these shows, there were corresponding contracts that indicated the amount the Defendants received. However, for other shows no such contracts were introduced into evidence. For these latter shows, the plaintiff has only estimated the amount the Defendants received and therefore has failed to carry his burden of establishing the amount of damages.

However, contracts were introduced that indicated that the Defendants received a specific amount for uses of the 2000 systems: the February 1984 show in Lafayette, Pennsylvania for $3,500.00; the May 1984 show in Chicago for $5,700.00; the June 1984 show at the Hoosier Dome for $11,000.00; the June 1984 show at Georgia World Congress Center for $18,000.00; the June 1986 show at the Grand Hyatt in New York for $9,350.00; the September 1986 show at the Bayfront Convention Center for $14,000.00; the November 1986 show at Kaufmann's for $15,000.00; the October 1986 show at the Palladium for $6,000.00; the November 1986 show at Smith Haven Mall for $16,200.00; the November 1986 show in Las Vegas for $18,000.00; and the December 1986 show in Pittsburgh for $19,800.00.[1]

1. Contracts for the following shows indicated that a 360 system was used: the June, 1986 show at the Empire State Center; the June, 1986 show at the Artpark Theater; the July, 1986 show in Indianapolis; and the September, 1986 show at Battery Park in New York. Recovery will not be permitted for these shows.

The total income for these shows is $136,550.00 and seventy-five percent of that total, $102,412.50, equals the net profit. One-third of the net profit is $34,137.50. Pursuant to N.Y. Civ. Prac. L. & R. § 5001 (a) & (b) & 5004 (McKinney 1992) ("CPLR"), plaintiff is entitled to interest at nine percent. The interest is to be computed when the damages were incurred, "or upon all of the damages from a single reasonable date." CPLR § 5001 (b). For the 1984 to 1986 period, an appropriate date for the interest to begin to be computed is August 1, 1986.

Weinreich also attacks the failure of the Opinion to draw an adverse inference against the Defendants for not retaining pre-June 1982 backup documentation concerning the ledger entries, even though this action was not commenced until 1983. This documentation was discarded when the Defendants moved offices in May 1981, and for the following year the Defendants had inadequate record keeping procedures. No additional evidence is cited to alter the finding in the Opinion that the plaintiff failed to establish that the Defendants destroyed these documents for the purpose of preventing their use in this or any other litigation. Nor is evidence proffered to establish that such backup documentation would not have supported the ledger entries, or the schedule of allocations by product.

Weinreich's remaining contentions have been considered and are hereby denied.

II. *Defendants' Motion to Amend to Correct Arithmetical Error*

Defendants' move pursuant to Fed. R. Civ. P. 52, 59 and 60 to correct an error that the Defendants made in 1990. One of the Defendants' employees allegedly failed to calculate certain

figures correctly concerning income for the 2000 Systems, and Sandhaus did not check these calculations before submitting them to the plaintiff and the Court.

The Defendants' motion is denied on several grounds. To begin with, the Defendants failed to comply with Rule 3 of the Civil Rules for the United States District Courts for the Southern and Eastern Districts of New York. Rule 3 provides:

> Upon any motion, the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion . . . Failure to comply may be deemed sufficient cause for the denial of the motion. . . .

This case has been pending for more than eleven years. Failing to comply with the local rules at this stage in the litigation is inexcusable. Accordingly, the Defendants' motion is denied.[2]

Defendants have moved under Fed. R. Civ. P. 60(b), which provides in pertinent part that: "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

The Second Circuit has ruled that it will not excuse a party

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2. To the extent that the Defendants' seek to use their memorandum of law filed in connection with their second motion, *see infra* section IV, as a memorandum for the instant motion, their request is denied since the memorandum is untimely.

under Fed. R. Civ. P. 60(b)(1) whose gross negligence caused the mistake from which relief is sought. *See Greenspahn v. Joseph E. Seagram & Sons,* 186 F.2d 616, 619-20 (2d Cir. 1951). In *Greenspahn,* the defendant's agent did not discover a mistake until shortly after the parties had settled their case by stipulation. The Second Circuit affirmed the trial court's denial of the defendant's motion to relieve it from the stipulation, and noted that the agent could have easily determined the mistake at issue three years before he discovered it. *Id. See also United States v. RG & B Contractors, Inc.,* 21 F.3d 952, 956 (9th Cir. 1994) (plaintiff who discovered favorable evidence subsequent to court's decision is not entitled to relief under 60(b)(1)). Likewise, in the instant case, Sandhaus had numerous opportunities to discover this mistake. Accordingly, Sandhaus' gross negligence does not warrant relief pursuant to Fed. R. Civ. P. 60(b)(1). Nor does Sandhaus' error rise to the extraordinary circumstances required to invoke Fed. R. Civ. P. 60(b)(6). *See RG & B Contractors,* 21 F.3d at 956 (citing *Ackerman v. United States,* 340 U.S. 193, 203 (1950)).

Defendants are also not entitled to relief pursuant to Fed. R. Civ. P. 60(a), which provides in pertinent part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court . . . ." Sandhaus prepared, or supervised the preparation of, the allegedly incorrect income figure in September 1990. Thereafter, these figures were relied on in various pretrial submissions to the Court. Sandhaus also testified at trial as to the veracity of the allegedly incorrect figure. Moreover, plaintiff relied on this figure in his post-trial submission. At no time during this three and a half year period did Sandhaus bother to recheck this income figure. Sandhaus now claims that he first became aware of the incorrect computation when he read the Opinion and realized that

Weinreich had relied on the figure. Yet Weinreich had relied on this figure — at the latest — in his first post-trial submission. Defendants' motion, made at the thirteenth hour, is accordingly denied on these alternative grounds.[3]

III. *Plaintiff's Motion for Sanctions*

Plaintiff moves for sanctions against both Sandhaus and his attorney pursuant to Fed. R. Civ. P. 11 and 37, 28 U.S.C. § 1927 and the inherent power of the Court.

While Plaintiff cites to the old Rule 11, he fails to note that an amended version became effective December 1, 1993. The new version applies, where practical, to civil cases pending at the time of the amendment. *See Knipe v. Skinner,* 19 F.3d 72, 78 (2d Cir. 1994). Since it is not impractical, the amended Rule 11 will be applied to the instant motion.

Rule 11 sanctions "should be imposed with caution." *Id.* (citations omitted). Under the amended rule, the imposition of sanctions are discretionary rather than mandatory. *Id.* Moreover, the rule is not a fee-shifting mechanism which automatically requires an award after a party loses its case. Rather, courts "must strive to avoid the wisdom of hindsight . . . and any and all doubts must be resolved in favor" of the party that signed the allegedly sanctionable document. *Eastway Constr. Corp. v. City of New York,* 762 F.2d 243, 254 (2d Cir. 1985).

A Rule 11 motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion . . . the

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3. To the extent that the motion is based on Fed. R. Civ. P. 52 or 59, the Defendants' arguments have been considered and are hereby denied.

challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Fed. R. Civ. P. 11(1)(A). In the instant case, the plaintiff failed to follow this procedure. Accordingly, the motion is denied.[4]

Furthermore, the great majority of the sanctionable conduct alleged in plaintiff's motion occurred between three and six years ago. The plaintiff's motion is consequently untimely, and is thus denied on this alternative ground. *See, e.g.*, 5A Wright & Miller, *Federal Practice and Procedure*, § 1337 ("Rule 11 motions should be made promptly after the challenged conduct takes place. If the alleged misconduct occurs during pretrial or discovery, the matter usually should be resolved at once, in order to . . . discourage further abuses.") *see also General Motors Acceptance Corp. v. Bates*, 954 F.2d 1081, 1085 (5th Cir. 1992) (thirty-three month delay in filing requires rejection of sanction motion).

The plaintiff's remaining contentions in the instant motion have been considered, and are hereby denied.

IV. *Defendants' Second Motion to Amend Findings of Fact and Conclusions of Law*

Defendants' move to amend the findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, 59 and 60 on a variety of issues.

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4. Plaintiff's contention that his 1989 sanctions motion, which was subsequently withdrawn, is sufficient for purposes of the safe harbor provision of Fed. R. Civ. P. 11(1)(A) is disingenuous, given that said provision did not become effective until 1993.

Appendix D

Defendants seek to introduce evidence — certain tax returns of the Defendants — which allegedly are probative of the allocation of rent between DSPI and SFC. Defendants possessed these tax returns at the time of trial, and could have moved to have them introduced at that time. They failed to do so, and will not now be permitted to reopen the trial to introduce this evidence. *See United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 831 F. Supp. 167, 169 (S.D.N.Y. 1993) (motion to amend may not be used to introduce evidence that was available at trial but was not proffered).

Defendants' remaining contentions have been considered and are hereby denied. *See* 9 Wright & Miller, *Federal Practice and Procedure,* § 2582 (Fed. R. Civ. P. 52(b) does not permit a "party who failed to prove his strongest case . . . a second opportunity by moving to amend").

Conclusion

As set forth above, plaintiff's judgment is increased by an additional $34,137.50 plus interest. The total judgment is thus $89,824.57 plus interest on that amount as set forth above and in the Opinion, plus costs. In all other respects, the parties' motions are denied.

Settle judgment on notice.

It is so ordered.

New York, N.Y.
June 30, 1994

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED APRIL 28, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (RWS)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS, a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

OPINION

APPEARANCES:

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Sweet, D.J.

This action by plaintiff Stephen Weinreich ("Weinreich")

against defendants Richard Sandhaus ("Sandhaus"), Science Faction Corporation ("SFC") and Dick Sandhaus Productions, Inc. ("DSPI") (collectively the "Defendants") was tried before the Court for ten days, from January 5 to January 18, 1994. Upon all prior proceedings, the findings of fact and the conclusions of law, judgment will be entered on the complaint in the amount of $55,687.07 with interest and costs.

Prior Proceedings

Weinreich commenced this action by the filing of a complaint on May 23, 1983 that alleged damages arising out of the collaboration of the parties on certain laser light show systems. Issue was joined and discovery proceeded.

In July 1987, an independent expert,[1] Brian O'Brien, was selected by both parties to assist the Court in resolving conflicts between Weinreich's discovery requests and the Defendants' need to protect confidential trade secrets and business information. O'Brien was charged with advising the Court if laser light show systems produced by the Defendants after 1980 were similar or derivative of the systems Weinreich worked on in 1978. O'Brien issued several reports, and amendments thereto, that concluded that the post-1980 laser light show systems were not similar or derivative of those Weinreich worked on.[2]

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1. The universe of laser light show experts is quite small. Prior to being retained as the independent expert, O'Brien had sold some equipment to the Defendants, and may have done some consulting work for them as well. When he was retained, O'Brien disclosed to Weinreich these previous equipment sales to the Defendants, but may not have disclosed his prior consulting work.

2. The first report was issued by O'Brien on November 21, 1987, and was paid for by both Weinreich and the Defendants. An amended report was issued on

(Cont'd)

Consequently, Weinreich was not entitled to discovery about these post-1980 systems.

On July 24, 1989, the Honorable Charles E. Stewart of this Court dismissed Science Faction Systems from this action. In addition, Judge Stewart granted the Defendants' motion for summary judgment dismissing Weinreich's first, second and third causes of action, which alleged a joint venture between the parties. Defendants' motion for summary judgment on the fourth and fifth causes of action, alleging *quantum meruit* and breach of contract respectively, was denied. On February 6, 1991, Judge Stewart adopted Magistrate Judge Naomi Reice Buchwald's Report and Recommendation that the Defendants' renewed motion for summary judgment on the fourth and fifth causes of action be denied. The action was assigned to this Court on December 22, 1993.

During the course of the trial in January 1994, twelve witnesses testified, two witnesses' deposition testimony were admitted in lieu of their trial testimony and numerous exhibits were admitted. Final submissions were completed on April 22, 1994, at which time the action was deemed submitted. The following constitutes the findings of fact and conclusions of law, as required by Fed. R. Civ. P. 52(a).

(Cont'd)

May 31, 1989, and was paid for by Weinreich. Pursuant to a Court order, O'Brien issued a third report, and two supplements thereto, in 1992; these reports were paid for by Weinreich. In November 1992, over Weinreich's objections and not pursuant to any Court order, O'Brien issued a supplemental report on the laser truck. This report was paid for by the Defendants. At trial, O'Brien appeared as one of the Defendants' experts, even though he held certain opinions that conflicted with their position. O'Brien anticipated being paid by the Defendants for appearing at trial.

Appendix E

Findings of Fact

Weinreich is a citizen of the State of New Jersey with a high school degree who has worked on various electro-mechanical design projects. Sandhaus is a resident of New York. SFC and DSPI[3] are both New York corporations engaged in various aspects of the entertainment business. Sandhaus is the sole shareholder and director of SFC and DSPI; he is also an officer, and has often been the only one. Sandhaus completely controls both SFC and DSPI.

In 1977, at the request of the rock band Foreigner, Sandhaus evaluated approximately eight entities in the United States and Europe that were creating laser light show systems. He concluded that those entities were not responsible and advised Foreigner not to deal with them. At about the same time, Dolgoff Holophase, Inc. — an entity that Sandhaus had an interest in — agreed to produce a laser light show system for Foreigner's 1977 tour. Sandhaus first met Weinreich through Dolgoff Holophase, and they and Michael Metz, an engineer and designer, worked together to produce this system. Because of its size, the system was known as the Elephant system. It was exhibited to Foreigner, but for a variety of reasons was not used during the 1977 tour.

Although Sandhaus was "personally humiliated" by the failure of the Elephant system, in late 1977 he approached Weinreich and Metz about working on another laser light show system for Foreigner's upcoming 1978 tour. This system became known as the Silver system. Weinreich was the principal mechanical designer for the laser projector; the electronic

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3. DSPI was originally incorporated in Connecticut. In 1977 or 1978, it became a New York corporation.

controls were manufactured by an independent contractor, 2005 A.D.

The Silver system had the following components: an external laser; slow, closed loop galvanometer scanners; a silver housing structure that tilted by manipulating devices inside the structure; dichroic filters; polarization rotators; front surface mirrors; irises to limit the range of the laser scan; linear proportional solenoids; a three color channel; bathroom glass effects selected with a linear solenoid; a dimmer/blanker; and an electronic controller system. Various light effects were created by the Silver system, including rosette figures, color separation dimmer and brighter light, and "washed" light.

Prior to April 1978, Sandhaus, Metz and Weinreich had several conversations about establishing a company to produce laser light show systems. The proposed company never came to fruition, and as a result Weinreich prepared a letter (the "1978 Letter") to govern his relationship with Sandhaus. The 1978 Letter was addressed to Sandhaus at DSPI, and provided:

> This will confirm our intention that all design work done by Stephen Weinreich for the laser light show currently in production is for the consideration of a 33 1/3 % interest in the net profit earned by sale or rental of this or similar or derivative systems at prices and conditions mutually agreeable to Sandhaus and Weinreich, such agreement not to be unreasonably withheld.
>
> Any funds drawn by Stephen Weinreich and charged against this project (other than

> expense reimbursements) will be considered as drawings on profits.
>
> This letter is not intended to be a complete agreement, but is to express the general intent of both parties and is to govern in this matter until such an agreement is executed.
>
> Your signature below indicates your agreement with these terms. Ex. 1.

The phrase in the 1978 Letter, "the laser light show currently in production," referred to the Silver system. On May 1, 1978, Sandhaus signed the 1978 Letter in his capacity as an officer of DSPI.[4]

In May 1978, the Silver system was completed and demonstrated to Foreigner. The demonstration was not successful, and the Silver system was not used on the Foreigner tour.

In June 1978, Sandhaus formed a second company, SFC. DSPI[5] and SFC shared common office space, but had separate bank accounts and ledgers, and filed separate tax forms. Neither DSPI nor SFC displayed any independent business discretion. For instance, in August 1978, Sandhaus wrote a letter on behalf of

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4. Sandhaus alleges that he was compelled to sign the letter under duress because Weinreich threatened to withhold the Silver system. The evidence is to the contrary.

5. Although it still exists and continues to pay franchise taxes, DSPI has been dormant since 1980.

SFC on DSPI stationery. Similarly, SFC's advertising literature indicated that it was "an affiliate of DSPI." Moreover, at trial Sandhaus illustrated the interconnectedness of the Defendants and his domination of both entities.[6]

The same month that it was formed, SFC acquired the Silver system from DSPI. Although Defendants cite to an SFC ledger entry that shows that DSPI was paid $9,000.00, the transaction was accomplished without any papers. While the SFC ledger does indicate that the $9,000.00 entry was for capital equipment, it does not specifically identify the Silver system as the product that was purchased. In contrast, more detailed notes existed for all other entries on that page of the ledger. Moreover, Defendants do not dispute Weinreich's contention that the DSPI revenue ledger for that time was never produced. Sandhaus also claimed that as a result of the Silver sale, DSPI was credited for certain rent payments and other expenses. However, Defendants fail to cite any ledger entries in support of their contention.

During the remainder of 1978, the Silver system was used at a disco trade show, at the Waldorf Astoria on two occasions, at a Red Cross show in Palm Springs, Florida and at the Xenon disco. Weinreich does not dispute the Defendants' contention that the net costs of the Silver system exceeded its net income, with a total negative balance of $20,289.20.

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6. In explaining DSPI's and SFC's arrangements with other entities, Sandhaus stated: "I was the subtenant . . ." Tr. 791; "I agreed to provide not only the hardware . . ." *Id.*; "So I marketed myself to him . . ." Tr. 908. Similarly, at a pretrial deposition Sandhaus explained how the Silver system was transferred from DSPI to SFC: "I am the sole shareholder of both of those corporations, and I made a decision . . . to establish [SFC, which] would deal only in the area of laser [business]." Ex. 1029, at 68.

Appendix E

Despite the problems with the Elephant and Silver systems, in the summer of 1978 Weinreich, Metz and Sandhaus started work on yet another system, the 2000 system. The components of the 2000 system were substantially the same as those in the Silver system, except for the following improvements: fast, closed loop galvanometer scanners; a black housing structure that tilted by manipulating devices outside the structure; rotary proportional solenoids; bathroom glass effects selected with a rotatable turret; and a computer controller system. Moreover, the basic optical path geometry of the Silver system was followed in the 2000 system.

Both the Silver and 2000 systems had a basic design function that was described by O'Brien:

> The [Silver] and 2000 . . . have fixed pairs of galvanometers. Each pair has a moving mirror on each galvo to steer the beam in each of two dimensions, up-down and left-right, but the galvos do not themselves move on their mountings. . . . the projection angle [of the two systems are] limited to only what the galvos can themselves alone produce, except when some auxiliary large external mirrors were employed to further direct the image. Ex. AF, at ¶ 11.

The first 2000 was delivered to the Xenon disco in the fall of 1978. By June 1979, there were approximately twelve 2000 systems in production.[7] In September 1979, Weinreich stopped

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7. Pursuant to regulations enacted by the United States Food and Drug Administration's Bureau of Radiological Health — subsequently named the Center for Devices and Radiological Health — (collectively "BRH"), producers of laser (Cont'd)

working for the Defendants. Thereafter, SFC continued to rent and sell 2000 systems. Additional features for the 2000 system were also created.

In 1981, SFC put on a laser light show at the Empire State Building that involved a 2000 system that primarily projected vertically, as opposed to horizontally. An external motor driven mirror device was attached to the 2000 housing, thereby permitting the beam to scan nearly 360 degrees. However, continuous 360 degree rotations were not possible because the system's wires would get tangled as it turned. In addition, as the system moved over 360 degrees, the images it projected would end up being upside-down.

Sandhaus maintained contemporaneous ledgers of revenues and disbursements for SFC.[8] However, Sandhaus did not allocate revenues and disbursements among the SFC products until 1990, well after the initiation of this action. According to his allocations, for the period 1978 to 1981, total income for the 2000

(Cont'd)
light show systems were required to file certain information on the product, the company and its quality control procedures. Sometime in 1978, SFC filed an initial product report with the BRH concerning the Silver system. After the filing of an initial product report, information on new laser light show systems produced by the same company could be filed with the BRH as supplemental reports to the initial report.

In late 1978 or early 1979, SFC filed supplemental reports on the 2000 with the BRH. In 1980, SFC applied for and was granted a variance for the 2000. Thereafter, SFC used the 2000 family designation for its future filings with the BRH on other products.

8. Although there were three discrepancies in the ledgers, the entire set of ledgers will not be disregarded.

system was $1,664,818.28, and total costs were $1,734,216.56, leaving a negative balance of $69,398.28. Weinreich adopted the income and cost figures for the 1978 to 1981 period as starting points, but urged corrections to support his damage claim.

An appropriate percentage of various overhead items that can be allocated to the 2000 systems is 66.95 percent, since this was the percentage of SFC's payroll that was allocated to that product. Based on this percentage, the following should be subtracted from the total cost of producing the 2000 system: (1) $26,384.61, representing the over-allocation of SFC tax penalties and interest that Sandhaus charged the 2000 system, (2) $43,590.86 in payroll taxes, representing an over-allocation of payroll taxes to the 2000 system, (3) $49,636.88 for an over-allocation of rent charged to the 2000 system,[9] (4) $24,575.70 for expenses that Sandhaus allocated to the 2000 system that SFC had already received as a credit in litigation with the rock band Kiss, and (5) $15,861.97 for over-allocations to the 2000 system of expenses that are generally not specific to any one product, including accounting services, insurance expenses, miscellaneous office expenses and a rent security deposit. In sum, the total over-allocation for the 2000 system from 1978 to 1981 was $160,050.02.[10]

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9. SFC and DSPI shared office space. However, DSPI was far less active than SFC before 1980, and thereafter it was dormant. Accordingly, it is appropriate that SFC pay four-fifths of the total rent for the office space, and that the 2000 system pay 66.95 percent of that amount.

10. Weinreich also contends that there were other overallocations. The evidence does not support Weinreich's contentions with respect to three items. The first is the $262,508.35 for production of the 2000 system from June, 1980 to December, 1981. Sandhaus acknowledges that there were no 2000 systems fabricated during this time. Weinreich thus contends that it was inappropriate to

(Cont'd)

Appendix E

The 2000 system income should also be increased by $3,410.00 for payments SFC received from the Xenon disco of $2,260.00 in sales tax income and $1,150.00 for a plexiglass case.[11]

SFC continued to rent and sell the 2000 until the summer of 1982. For the first five months of 1982, SFC received rental and sales income for 2000 systems totalling $82,875.00.

Beginning in 1981, SFC began to develop the 360 system, which was a significant departure from the Silver and 2000 systems. The 360 system could project a figure over 360 degrees without the image rotation problem associated with the Empire State Building project. As explained by O'Brien:

> Unlike the [Silver or 2000 systems], which use one or several parallel pairs of fixed galvos for simultaneous projection from a

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(Cont'd)

allocate *any* money for production, even though the 2000 systems continued to be rented during this time. However, there were expenses related to renting the 2000 systems. Although employees handled some of these tasks, outside entities did as well. Moreover, during this time Sandhaus also paid certain bills incurred previously for the fabrication of 2000 systems. The second item is $17,573.16 in capital equipment as to which there was no evidence that these expenses were not used for the 2000 systems. The third item is $32,248.65 in various expenses including telephone and telex charges and travel and trucking expenses which are not allocatable on a 66.95 percent basis, since no evidence was submitted to indicate that these charges were not for the 2000 systems.

11. Weinreich also claims that an additional $4,000 should be credited to the 2000 system because SFC received an on-screen credit in part payment for a rental. The Court will not credit the 2000 system with this amount since no evidence was introduced about the fair value of an on-screen credit.

> stationary projector box, the new 360 series uses only one pair of galvos mounted in an elaborately articulated assembly. The galvos rotate in tilt motion as a pair together on a subassembly. In addition, this entire subassembly, rotates 360 degrees on the pan axis, hence the name 360 series. This technique enables coverage with an image on an entire hemisphere and slightly more, without external mirrors for projection to any part of this hemisphere. Ex. AF, at ¶ 12.

Consequently, the 360 system was, according to its designer, Stephen Schultz, a "fundamentally new approach, not a slight extension" of the Empire State Building project. Tr. 500. Indeed, Weinreich's expert, Leo Beiser, admitted that the design change in the 360 system was a "fundamental one."

The 360 system was first used at the Knoxville Worlds Fair, which began in May 1982. At that time, three of the four then existing 360 systems were used in Knoxville. The fourth was used for a July 4th show at New York Harbor. Thereafter, except as noted below, SFC used the 360 systems for its future rentals and sales; it no longer used systems similar or derivative of the Silver or 2000 systems.

The indoor show at the Knoxville Worlds Fair used a system that was one-quarter derived from the 2000 system. O'Brien stated that the amount of derivation for this system was "probably less than half but more than a trivial portion." As noted, the Knoxville show also used three 360 systems outdoors. The total rental for all systems was $410,000.00. The evidence also shows that a system similar to the Knoxville indoor system was used in

Sao Paulo, Brazil in April 1983. The total rental for that show was $55,000.00.

For SFC income received after May 1982, $5,334.88 received from Palace Management was for a prior 2000 system sale.[12] A 2000 system was also used — together with a 360 system — at the New York Harbor show on July 4, 1982. SFC received $15,000.00 for this show. For this period, a fair cost is 75 percent of total income, based on the income and costs of the 2000 digital product.[13]

Weinreich was also involved in projects other than the Silver and 2000 systems for the Defendants. In early 1978, Weinreich participated in the design of a centerfold for Foreigner. For this project he was paid $500.00. Weinreich also worked on a commercial for Bulova, for which he was paid $250.00 for a day's work. In May 1978, Weinreich worked on a project called Laser Tinker Bell, which was designed and fabricated very quickly and was delivered to the client in Philadelphia. Weinreich was never paid for this project. In early 1979 and again in July 1979, Weinreich helped to prepare a trade show booth and brochure for SFC. He also attended one of the trade shows. Weinreich was not paid for this project. The same year Weinreich worked "a little bit" on a laser video report with Metz for SFC.

In March 1979, SFC and the rock band Kiss and its managing

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12. Weinreich also seeks to include monies received by the Defendants from the Brittania Beach Hotel, Palace Management and the Visage disco. Since these sums were merely related to the servicing of 2000 systems and for purchases of other hardware, they are not included in the 2000 system income.

13. According to Sandhaus, for the 2000 digital products, costs were $250,736.93, and income was $1,017,124.49.

agent, Aucoin Management, Inc., entered into a contract with SFC. SFC was to provide four laser and optical components for an upcoming tour by Kiss and received $130,000.00 upon the signing of the contract, and was to receive an additional $5,000.00 for each week of the twenty-six week tour. Weinreich and Metz worked on the four components full time from March to June 1979. Metz was required to take a leave of absence from another job to do so, and was paid pursuant to an employment contract. Weinreich was paid $10,700.00 for the work he did on this project.

In June 1979, the project was demonstrated to Kiss in Lakeland, Florida. The project failed to perform, and Kiss did not take it on tour. At the time, SFC had nonetheless been paid an additional $10,000.00. Thereafter, litigation ensued, and SFC was required to return the $10,000.00 it had been paid in June. SFC, however, was entitled to retain the $130,000.00 that it previously received.

In the summer of 1979, Weinreich worked on several projects, including a color chopper, a beam stealer and a laser chaser. These were all intended to be components of the 2000 system. He was not paid for this work.

For all of these projects, Weinreich did not keep any time records nor did he ever bill Defendants for his services. Nonetheless, Weinreich maintains that he worked full time for Sandhaus from April 1978 to September 1979. During this period, Weinreich was paid approximately $14,875.00, which he considered to be a draw on his agreement to receive profits.

Weinreich's claim that he worked full time from April 1978 to September 1979 is not credible. For instance, Weinreich

admitted that he did not work during the month of August 1979. Weinreich also admitted that from April 1978 to sometime that summer, he only worked twenty hours a week for the Defendants. In addition, Weinreich acknowledged that sometime before September 1979, he received $9,000.00 from other clients for several weeks of work. Finally, Weinreich's testimony at depositions and at trial concerning the amount of time he spent on particular projects varied considerably.[14]

In September 1979, Weinreich quit working with Sandhaus. The following month, Weinreich wrote Sandhaus about commissions for bringing in new business. In the letter he noted that "a resolution of the question of the Metz, Sandhaus, Weinreich relationship has not yet been resolved." In 1980, Metz sued Sandhaus for an accounting of the alleged joint venture. Metz did not prevail because the court found that he did not have an agreement with Sandhaus concerning the joint venture. (*Metz v. Sandhaus*, No. 14941/80 (N.Y. Sup. Ct. June 20, 1984)).

At the end of May 1981, SFC moved its offices from Park Avenue to West 52nd Street in New York City. In the process of moving, SFC discarded various documents, including records

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14. Weinreich's reliance on the testimony of Metz and Schultz on this point is also not persuasive. Metz, who also sued the Defendants, testified that he spent about 2000 hours working for the Defendants, and that a significant amount of that time was spent with Weinreich. However, a substantial part of their collaboration was spent working on the Silver and 2000 systems and the Kiss project, of which Weinreich is not entitled to any *quantum meruit* recovery. *See infra* section VI.

Schultz, in response to a question about how often he saw Weinreich at the Defendants' offices, testified: "If I had to try to remember and put an average on it, I think I would say 20 to 25 hours per week." Schultz, however, repeatedly testified that time frames were difficult for him to specify. Indeed, Schultz was unable to even state when he started working for the Defendants.

concerning expenses and disbursements for the Silver and 2000 systems that related to the entries in the DSPI and SFC ledgers. Sandhaus testified: "I know a great deal was lost at that time in that move, a lot intentionally, because we had no place to put the stuff." No evidence was proffered as to the contents of these documents. Weinreich failed to establish that Sandhaus destroyed these documents for the purpose of preventing their use in current or future litigation, nor was any evidence adduced that invalidated the integrity of the ledgers.

Conclusions of Law

This Court has jurisdiction pursuant to the diversity statute, 28 U.S.C. § 1332, and thus applies the choice of law rules of the forum state, New York. *Krauss v. Manhattan Life Ins. Co.*, 643 F.2d 98, 100 (2d Cir. 1981). Interest analysis is normally applied in New York to choice of law issues concerning contract disputes. *See Hutner v. Greene*, 734 F.2d 896, 899 (2d Cir. 1984). In this case such analysis is not required since the parties have assumed that New York law applies by relying on it to support their arguments. *See Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 52 (2d Cir. 1984) (in New York, "in the absence of a strong countervailing policy, the parties to litigation may consent by their conduct to the law to be applied"). Accordingly, the Court will apply New York law.

I. The 1978 Letter is an Enforceable Contract

Defendants initially argue that the 1978 Letter is not a binding contract, but rather is only a letter of intent.[15] An analysis

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15. In 1982, in the Metz case, Sandhaus testified that the 1978 Letter was an agreement. At trial, Sandhaus testified that his deposition statement was incorrect.

of preliminary agreements such as this one begins with the Honorable Pierre N. Leval's opinion in *Teachers Ins. & Annuity Assoc. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987). *See also Arcadian Phosphates. Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989). There are two types of preliminary agreements. In the first, the parties have come to an agreement on all the issues that require negotiation. "Such an agreement is preliminary only in form — only in the sense that the parties desire a more elaborate formalization of the agreement." *Tribune Co.*, 670 F. Supp. at 498. *See also V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1978), *cert. denied*, 394 U.S. 921 (1969) ("the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event"). This type of agreement could be referred to as a binding preliminary agreement.

The second type of preliminary agreement is termed a binding preliminary commitment. In this situation, the parties agree to an incomplete agreement but accept "a mutual commitment to negotiate together in good faith in an effort to reach a final agreement . . . ." *Tribune Co.*, 670 F. Supp. at 498.

In the instant case, Weinreich contends that the 1978 Letter is of the first type, a binding preliminary agreement. The Second Circuit considers four factors in determining whether such an agreement exists. *See Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir. 1985); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-76 (2d Cir. 1984). The factors are:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing;

> (2) whether there has been partial performance of the contract;
>
> (3) whether all of the terms of the alleged contract have been agreed upon; and
>
> (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Winston, 777 F.2d at 80.

The Second Circuit has at various times stated that "[n]o single factor is decisive, but each provides significant guidance." *R.G. Group*, 751 F.2d at 75. *See also Consarc Corp. v. Marine Midland Bank. N.A.*, 996 F.2d 568, 576 (2d Cir. 1993). But the Second Circuit has also stated, in the context of a binding preliminary commitment, that the first factor is the most important. *Arcadian Phosphates*, 884 F.2d at 72. *See also Argonaut Ins. Cos. v. Medical Liab. Mut. Ins. Co.*, 760 F. Supp. 1078, 1083 (S.D.N.Y. 1991). Similarly, in cases involving binding preliminary agreements, the same importance should be placed on what the specific writing in question provides.

The first factor weighs heavily in favor of the plaintiff. The 1978 Letter provides: "This letter is not intended to be a complete agreement, but is to express the general intent of both parties and *is to govern in this matter until such an agreement is executed*" (emphasis added). This language indicates that the parties intended to create a more complete agreement in the future. Until such an agreement was created, however, the language clearly indicates that the 1978 Letter would govern. In contrast, contracts that were found not to be binding preliminary agreements

contained provisions indicating that the contract was not intended to govern in the absence of a complete agreement. *See, e.g., Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 262 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984) (drafts that provided "when executed and delivered, this [agreement] will be a valid and binding agreement" indicated no intent to be bound until the execution of a formal contract); *R.G. Group*, 751 F.2d at 76 (explicit wording of franchise agreement that declared "when duly executed" prevented a finding that parties intended to be bound prior to such execution).

The second factor, whether there has been partial performance of the contract, also weighs in favor of the plaintiff. Neither party disputes that Weinreich worked both before and after the execution of the 1978 Letter, nor that DSPI and SFC accepted these services and periodically advanced monies for them. *See R.G. Group*, 751 F.2d at 75 ("partial performance is an unmistakable signal that one party believe there is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect").

The third factor weighs slightly in favor of the Defendants, since it is acknowledged that the parties had not reached an understanding as to "net profit". However, the existence of open terms does not per se defeat a finding of a contract. Indeed, "a court should find an agreement too indefinite only as a 'last resort' when it is 'satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear.' " *Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 840 (2d Cir. 1993) (quoting *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483, 548 N.Y.S.2d 920, 923 (1989), *cert. denied*, 498 U.S. 816 (1990)). The term net profit can easily be defined by reference to an extrinsic standard.

See Black's Law Dictionary 939 (5th ed. 1979) ("Net profits. Profits after deduction of all expenses"). *Cf. V'Soske*, 404 F.2d at 499 (finding the term "audited net worth" has a well defined meaning).

The fourth factor does not favor any party. The laser light show business at the time of the events in question was experimental and uncertain. No evidence was presented that arrangements between persons doing this work were customarily of an oral or written nature, or, if contracts were used, to what extent they were more complex than the 1978 Letter. Moreover, the importance of the third and fourth factors are also tempered by the fact that the 1978 Letter specifically provided that it would govern until a more complete agreement existed.

In sum, upon consideration of the four factors, a binding preliminary agreement was reached. This conclusion is especially warranted given the language of the 1978 Letter, which explicitly provided that the agreement would govern the parties relationship until a more formal agreement was executed.

II. The Defendants are Jointly and Severally Liable under the 1978 Letter

Plaintiff seeks to hold the Defendants jointly and severally liable under the 1978 Letter. To do so, plaintiff urges the Court to pierce the corporate veil of defendant DSPI.[16] In New York, courts "disregard the corporate form reluctantly." *Gartner v. Snyder*, 607 F.2d 582, 596 (2d Cir. 1979); *see also Itel Containers Int'l Corp. v. Atlanttrafik Express Service, Ltd.*, 909 F.2d 698, 703

16. As found above, Sandhaus signed the 1978 Letter in his capacity as an officer of defendant DSPI. At the time of the signing, defendant SFC had not yet been incorporated.

(2d Cir. 1990). Between a corporation and its owners, "there is a presumption of separateness . . . which is entitled to substantial weight." *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir.) (citations omitted), *cert. denied*, 488 U.S. 852 (1988). The party seeking to pierce thus bears the burden of putting forward evidence that there is a basis to disregard the corporate form. *Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978), *aff'd*, 599 F.2d 34 (2d Cir. 1979).

To overcome the presumption of separateness and pierce the corporate veil, there must be a showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. Dep't of Taxation and Finance*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810-11 (1993). *Cf. Wm. Passalacqua Builders. Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) ("[l]iability . . . may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties"); *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993). The *Passalacqua* court set forth ten factors to consider in determining whether to pierce the corporate veil:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping corporate records and the like,
>
> (2) inadequate capitalization,

(3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes,

(4) overlap in ownership, officers, directors, and personnel,

(5) common office space, address and telephone numbers of corporate entities,

(6) the amount of business discretion displayed by the allegedly dominated corporation,

(7) whether the related corporations deal with the dominated corporations at arms length,

(8) whether the corporations are treated as independent profit centers,

(9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and

(10) whether the corporation in question had property that was used by other of the corporations as if it were its own. 933 F.2d at 139.

Consideration of these factors is a fact specific inquiry that necessarily "differs with the circumstances of each case."

American Protein, 844 F.2d at 60 (citing *FMC Fin. Corp v. Murphee*, 632 F.2d 413, 422 (5th Cir. 1980)).[17] Ultimately, "the general principle followed by the courts has been that liability is imposed when doing so would achieve an equitable result." *A/S Domino Mobler v. Braverman*, 669 F. Supp. 592, 594 (S.D.N.Y. 1987) (citing *Brunswick Corp.*, 599 F.2d at 35). *See also William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600-01 (2d Cir. 1989); *Citicorp Int'l Trading Co. v. Wester Oil & Refining Co.*, 790 F. Supp. 428, 437 (S.D.N.Y. 1992). *Cf. Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 985 (S.D.N.Y. 1992) (citations omitted) (existence of post-tort activity, "together with substantial ownership of stock of a corporation by one individual will support piercing the corporate veil for jurisdictional purposes on grounds of equity and fairness").

Piercing the corporate veil is appropriate in this case. The evidence demonstrates that Sandhaus was always in total control of both defendants DSPI and SFC. Moreover, if Weinreich could only pursue DSPI under this cause of action, he would essentially be denied any recovery because of Sandhaus' control of both entities. consideration of the *Passalacqua* factors, including the stock holdings by Sandhaus and common office space, supports this holding. *See Carte Blanche (Singapore)*, 2 F.3d at 28 (factors

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17. The alleged domination or fraud that forms the basis to pierce the corporate veil "must have occurred at the same time as the transaction that is complained of." *Holborn Oil Trading, Ltd. v Interpetrol Bermuda, Ltd.*, 774 F. Supp. 840, 845 (S.D.N.Y. 1991) (citing *Passalacqua*, 933 F.2d at 138). Nonetheless, the inquiry "examines the full spectrum of the relations" between the controlling party and the corporation. *Id.* To that end, the Court considers the timing of the transfer of the Silver system from DSPI to SFC to be a factor in the piercing analysis. *Cf. Kinetic Instruments. Inc. v. Lares*, 802 F. Supp. 976, 985 (S.D.N.Y. 1992) (quoting *Minnesota Mining & Mrg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) (courts consider post-tort activities that "strip the corporation of its assets in anticipation of impending legal liability")).

listed by court that pierced corporate veil included lack of separate offices and officer who was chairman of both corporate boards); *see also Passalacqua*, 933 F.2d at 140.

As noted above, Sandhaus was in sole control of both companies.[18] *See David v. Glemby Co.*, 717 F. Supp. 162, 167 (S.D.N.Y. 1989) (in denying parent defendant's motion for summary judgment, court considers fact that those who controlled the defendant corporations referred to them as "our corporations"). Similarly, Sandhaus used DSPI stationery to write a letter on behalf of SFC. In *David*, 717 F. Supp. at 167, the court noted that the principals' use of the letterhead of one company on behalf of a second company suggested that they acted on behalf of both companies simultaneously. *See also Carte Blanche (Singapore)*, 2 F.3d at 28. SFC's advertising literature also indicated that it was "an affiliate of DSPI."

The circumstances surrounding the purported sale of the Silver system from DSPI to SFC are also suspect, based upon the facts found above, and establish that the two entities did not deal with each other at arms length. Indeed, Defendants have not cited to a specific DSPI ledger entry — unlike their SFC ledger cite — to support their position that DSPI was compensated for the sale. Furthermore, Defendants do not cite to any ledger entries to support Sandhaus' testimony that DSPI was also credited for certain office and equipment rent as part of the transaction.

Finally, the Defendants admit that DSPI has been dormant for years, and thus presumably cannot satisfy a judgment in Weinreich's favor. It is thus inequitable for defendants Sandhaus and SFC to hide behind a corporate shield. "Carrying on a

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18. *See supra* footnote 6 and accompanying text.

business without substantial capital and leaving the corporation without substantial assets to meets its debts can justify piercing the corporate veil." *Directors Guild of America, Inc. v. Garrision Productions, Inc.*, 733 F. Supp. 755, 762 (S.D.N.Y. 1990). Indeed, Sandhaus' business dealings with DSPI and SFC are similar to the facts in *Directors Guild.* There the court held the principal and a sibling corporation jointly and severally liable for the contracting corporation's judgment. A similar result is justified in this case. Accordingly, defendants Sandhaus and SFC are jointly and severally liable under the 1978 Letter.

III. Weinreich's Work on the Silver System was Sufficient to Entitle Him to Recover under the 1978 Letter

Defendants contend that Weinreich's work on the Silver system was not competent, and thus he is not entitled to recovery under the 1978 Letter as a consequence of his failure to perform pursuant to the agreement. The same argument is used by the Defendants in seeking recovery under their counter-claims. A party to a contract can expect performance with "reasonable care and competence owed generally by practitioners in the particular trade or profession." *Milau Assoc., Inc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 398 N.Y.S.2d 882, 885 (1977).

In 1978, the laser light show business was in its infancy. As Sandhaus testified, a year earlier he had evaluated approximately eight entities that were creating laser light show systems; he found none of them responsible, and thus worked with Metz and Weinreich to create their own system. Essentially, they were starting a new venture in uncharted territory.

The parties concede that there were several problems with the Silver system, such as the tilting mechanism and the silver

housing. Indeed, the system was not used by its intended client, Foreigner. Nonetheless, the Silver system was used at various venues, including the Xenon disco and the Waldorf-Astoria. More importantly, Sandhaus continued to work with Weinreich for more than a year after Foreigner rejected the Silver system. It is simply not credible that Sandhaus would continue to work with someone for another year after determining that his services were incompetent. Accordingly, Weinreich's performance in connection with the Silver system was reasonable, given the state of the laser light show business at that time. For the same reasons, Defendants' counter-claims are dismissed.

IV. The 2000 System is Similar or Derivative of the Silver System: the 360 System is Not

The 1978 Letter provided that Weinreich would be entitled to one-third the net profits of all products that are similar to or derivative of the Silver system. Not surprisingly, the parties disagree as to the meaning of the phrase "similar or derivative." Weinreich urges a broad interpretation while the Defendants maintain that a narrow reading is appropriate.

In construing contractual provisions, courts must initially determine if the language is ambiguous. Language in a contract is "ambiguous if it is reasonably susceptible of more than one interpretation." *Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir. 1990). Moreover, "[l]anguage whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation." *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (citations omitted). Reference to an extrinsic standard that makes the meaning clear is appropriate. *See Mar Oil*, 982 F.2d at 840. Neither the terms "similar" nor "derivative"

are ambiguous in this context. both terms are readily defined by reference to a standard dictionary. Webster's Ninth New Collegiate Dictionary 342, 1098 (1985) defines similar as: "1: having characteristics in common . . . 2: alike in substance or essentials." Derivative is defined as: "1: formed by derivation 2: made up of or marked by derived elements."

Both the 2000 system and the Empire State Building system are similar to and derivative of the Silver system. The 360 system and all other systems developed after 1982 are not.

Both the Silver system and the 2000 system are substantially similar: the basic design function and the optical path geometry of the two systems were the same, and they both have nearly identical components, except to the extent that the 2000 has certain improved features. Significantly, the functioning of the galvanometers — which direct the laser beams — are nearly identical in both systems. The Empire State Building system was also similar to the Silver system. In fact, the evidence indicates that the Empire State Building system was simply a modified 2000.

In contrast, the 360 system was a significant departure from the Silver and 2000 systems. Unlike the prior laser light show systems developed by DSPI and SFC, the 360 could project a figure over 360 degrees without an image rotation problem. This was a significant development that was due to an entirely new assembly for the galvanometers. As O'Brien stated:

> Unlike the [Silver or 2000 systems], which use one or several parallel pairs of fixed galvos for simultaneous projection from a stationary projector box, the new 360 series

> uses only one pair of galvos mounted in an elaborately articulated assembly. The galvos rotate in tilt motion as a pair together on a subassembly. In addition, this entire subassembly, rotates 360 degrees on the pan axis, hence the name 360 series. Ex. AF, at ¶ 12.

As such, the 360 was not similar since the galvanometer characteristic between this system and the prior systems were not at all in common. Moreover, the 360 was not derivative since the galvanometer assembly, which is a significant element of these systems, was entirely new.

V. Damages for Breach of the 1978 Letter

Pursuant to the 1978 Letter, Weinreich is entitled to one-third the net profits of the Silver and 2000 systems. Certain calculations are not in dispute. For the Silver system, the profits are a negative $20,289.20. The parties, however, strenuously contest the calculation of the net profits for the 2000 series.[19]

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19. Weinreich contends that the Court should draw an adverse inference against the Defendants because Sandhaus failed to retain — during his office's 1981 move — backup documentation to support DSPI and SFC ledger entries. To draw an adverse inference against a spoliator, courts must initially determine if there was a duty to preserve evidence. If such a duty existed, courts then consider both the intent of the spoliator as well as the contents of the destroyed evidence.

Presuming Sandhaus had a duty to preserve, the destruction of the documentation was not intentional, i.e. it was not "intended to prevent the use of this evidence in litigation." *Turner v. Transit Lines, Inc.*, 142 F.R.D. 68, 74 (S.D.N.Y. 1991) (Magistrate Judge Francis), *aff'd*, 1992 U.S. Dist. Lexis 2827 (S.D.N.Y. Mar.

(Cont'd)

Appendix E

Plaintiff bears the burden of proving damages. *Manshul Constr. Corp. v. Dormitory Authority,* 79 A.D.2d 383, 386, 436 N.Y.S.2d 724, 728 (1st Dep't 1981).

According to the Defendants' calculations for the 1978 to 1981 period, total income for the 2000 system was $1,664,818.28, and total costs were $1,734,216.56, leaving a negative balance of $69,398.28. As set forth above, costs should be deducted by $160,050.02, leaving a total cost of $1,574,166.54, and income should be increased by $3,410.00, for a total income of $1,668,228.28.[20] Consequently, the net profits

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19, 1992). Nonetheless, certain circuits have held that the negligence of the spoliator can suffice to draw an adverse inference. *See Pressey v. Patterson,* 898 F.2d 1018, 1024 (5th Cir. 1990); *Glover v. BIC Corp.,* 6 F.3d 1318, 1329 (9th Cir. 1993). The Second Circuit, however, has declined to do so. *See Berkovich v. Hicks,* 922 F.2d 1018, 1024 (2d Cir. 1991); *see also Britt v. Block,* 636 F. Supp. 596, 606-07 (D. Vt.) (negligent destruction of evidence is insufficient to change the burden of proof), *aff'd mem.,* 805 F.2d 390 (2d Cir. 1986). *Cf. Skeete v. McKinsey & Co.,* 1993 U.S. Dist. Lexis 9099, at *21 (S.D.N.Y. July 7, 1993) (dicta); *Turner,* 142 F.R.D. at 75-76 (dicta).

Even if an adverse inference could be drawn for the negligent destruction of evidence, the contents of the destroyed documents in this case would not support such an inference. In cases involving negligent destruction, "it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him." *Turner,* 142 F.R.D. at 77 (citing *Stanojev v. Ebasco Services, Inc.,* 643 F.2d 914, 924 n. 7 (2d Cir. 1981)). Accordingly, "special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence." *Id.* In the instant case, no evidence was presented to indicate that the backup documentation would not have supported the ledger entries. Consequently, an adverse inference will not be drawn against the Defendants for failing to retain this documentation.

20. Weinreich failed to meet his burden of proof as to certain items that he sought to include as income and costs for this period. *See supra* footnotes 10 and 11.

of the 2000 System were $94,061.74. From this amount should be deducted the negative balance from the Silver system of $20,289.20, for a total net profit of $73,772.54. Weinreich is entitled to one-third this amount, $24,590.85, minus the draw on profits he previously received. Weinreich was advanced $14,875.00, of which $10,700.00 should be deducted for work on the Kiss project. The total draw is thus $4,175.00, and the total amount that Weinreich is entitled to is $20,415.85 for the 1978 to 1981 period.

Weinreich also seeks damages for the use of the 2000 system after 1981. Based on the Court's finding above, Weinreich is entitled to one-third the sum of the following: $82,875.00 for income received by SFC for the first five months of 1982; $25,625.00, which represents one-sixteenth of the income received from the Knoxville Worlds Fair show;[21] $13,750.00, which — for the same reasons as the indoor show at Knoxville — represents onefourth of the amount received for the show in Sao Paulo, Brazil; $5,334.88, for an earlier 2000 sale to Palace Management; and $7,500.00, which represents one-half of the revenue generated by the New York Harbor show in July 1982. The total income for all these projects is $135,084.88. For post-1981 uses of the 2000 Systems seventy-five percent of the total income equals the net profit, according to the Sandhaus allocation referred to in footnote 13 above. The net profit is thus $101,313.66. One-third of this total is $33,771.22.

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21. This amount is calculated as follows: only one of the four laser systems, the indoor show, used a 2000-derivative system. Thus, only one-fourth of the show's income should be credited to this indoor show. And only one-fourth of this indoor system was derived from a 2000 system. Accordingly, one-sixteenth of $410,000.00 should be considered derivative income from a 2000 system.

Appendix E

Weinreich's total damages under the breach of contract cause of action are $54,187.07. Pursuant to N.Y. Civ. Prac. L. & R. § 5001 (a) & (b) (McKinney 1992) ("CPLR"), Weinreich is entitled to interest on the breach of contract damages. The interest rate is six percent for pre-June 25, 1981 damages, and nine percent thereafter. CPLR § 5004. The interest is to be computed when the damages were incurred, "or upon all of the damages from a single reasonable date." CPLR § 5001 (b). For the 1978 to 1981 period, an appropriate date for the interest to begin to be computed is June 30, 1980. For the 1982 and 1983 period, the interest should begin to be computed on June 30, 1982.

VI. The Quantum Meruit Cause of Action

Plaintiff Weinreich also seeks recovery under *quantum meruit* from the Defendants for work performed on projects other than the Silver system. In connection with the 2000 system, Weinreich contends — without citing to any authority — that he is entitled to *quantum meruit* for the work he did on this system, even though he is receiving one-third of the net profits under the 1978 Letter. It is well settled that recovery in *quantum meruit* is unavailable where an express contract covers the subject matter. *Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 48 (2d Cir. 1988). The 1978 Letter does not address Weinreich's work on systems subsequent to the Silver system. However, courts can imply terms in a contract, either in fact or in law:

> "Implied terms have been divided into three categories: (1) terms that the parties intended, (2) terms that the parties would have intended had they thought about it and (3) terms that are fair. The first involves a search for the parties' intention, the second involves a

> search for the parties' hypothetical intention, the third has nothing to do with the parties' intention, except that the court will generally not imply a term in the face of the parties' expressed intent to the contrary . . . . "Implied in law" or "constructive" terms . . . include the second and third categories. *Yonkers*, 844 F.2d at 46 (quoting Hadjlyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 Fordham L. Rev. 35, 38 n. 22 (1985)).

At trial, neither party proffered evidence concerning the first category of implied terms. Consequently, the Court considers whether a provision concerning the 2000 system is implied in law under either the second or third category for the 1978 Letter. During 1978 and 1979 the parties — and especially Weinreich[22] — acted as joint venturers. Although this collaboration never came to fruition, had "they thought about it," 844 F.2d at 46, the parties would have provided that Weinreich was entitled to one-third of the net profits from the 2000 system as well. More importantly, in any event the parties would not have provided that Weinreich was entitled to one-third of the profits *and* an hourly wage for work performed in connection with the 2000 system. For the same reasons, such a provision is fair as well. Accordingly, Weinreich may not recover an amount in *quantum meruit* for the work he did on the 2000 system.

He may, however, seek *quantum meruit* for work done on other projects. To recover in *quantum meruit*, a party "must

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22. For instance, Weinreich considered payments in connection with the 2000 system to be draws on profits.

establish performance of his services in good faith, acceptance of the services by persons to whom such services were rendered, expectation of compensation, and the reasonable value of such services." *Paper Corp. of United States v. Schoeller Technical Papers. Inc.*, 773 F. Supp. 632, 640-41 (S.D.N.Y. 1991) (citing *Martin H. Bauman Assocs. v. H&M Int'l Transp., Inc.*, 171 A.D.2d 479, 567 N.Y.S.2d 404 (lst Dep't 1991)). Plaintiff bears the burden of proof in *quantum meruit* actions. *Miller v. Maryland Casualty Co.*, 114 Misc.2d 309, 452 N.Y.S.2d 309, 311 (N.Y. Civ. Ct. 1982).

Based on the evidence presented, Weinreich has met the first three prongs of the *quantum meruit* test. Weinreich performed services for the Defendants at various times from April 1978 to September 1979. During this time, it is not disputed that Weinreich worked on various projects for the Defendants. These services were accepted by the Defendants and despite the present complaints about the quality of these services, and despite the failure of the Silver system, Sandhaus again worked with Weinreich on the 2000 system and the Kiss project, thus recognizing in fact the experimental nature of the work being performed.

The third prong of the *quantum meruit* test has also been met. Throughout their collaboration, Weinreich believed that he, Sandhaus and Metz would be joint venturers. Ultimately, this venture never materialized. It is reasonable to conclude that Weinreich would nonetheless expect to be compensated. Indeed, it is inconceivable that Weinreich would have worked for the Defendants at various times over eighteen months for free.[23]

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23. Defendants' reliance on *Reisner v. Recco Temporary Services, Inc.*, 136 A.D.2d 686, 524 N.Y.S.2d 102 (2d Dep't 1988) and *Mance v. Mance*, 128 A.D.2d

(Cont'd)

Appendix E

Weinreich's difficulty in recovering under *quantum meruit* is the fourth prong, a reasonable value for the services rendered. Specifically, the evidence presented does not support Weinreich's contention that he should be compensated at $60.00 an hour for work allegedly performed for the Defendants for forty hours a week for 78 weeks. To begin with, the work Weinreich did on the 2000 system is covered by the 1978 Letter and thus recovery under *quantum meruit* is not appropriate. The primary evidence presented in support of Weinreich's contention that he worked full time for 78 weeks is his own testimony, which was not credible on this issue.[24] Weinreich neither kept time records nor ever billed the Defendants for work he allegedly performed. Moreover, Weinreich was unable to specify how much time he spent on any particular project on any particular day. In contrast, in *Paolangeli v. Thaler*, 187 A.D.2d 881, 882, 590 N.Y.S.2d 316, 317 (3rd Dep't 1992), the court dismissed defendant's contention that there had been a failure to prove reasonable value of service when the plaintiff proffered detailed daily records of his work.[25]

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448, 513 N.Y.S.2d 141 (1st Dep't 1987) is misplaced. In *Reisner*, the plaintiff had expressly indicated that he would work a certain period without a salary. In contrast, in this case the evidence does not support a finding that if the parties' venture did not materialize, that Weinreich would not expect to be compensated for the work he had done. In *Mance*, unlike this case, the plaintiff had received a salary and fringe benefits.

24. *See supra* note 14 and accompanying text. Moreover, the testimony of Metz and Schultz, taken together with Weinreich's, is insufficient to meet plaintiff's burden in *quantum meruit*.

25. Weinreich's reliance on *Mar Oil, S.A. v. Morrissey*, 982 F.2d 840 (2d Cir. 1993), is misplaced. More disturbing, counsel's description of the holding in
(Cont'd)

Accordingly, Weinreich has not carried his burden to prove that he worked full time for eighteen months.

However, as detailed below, there were specific projects that Weinreich worked on during this eighteen month period in which the evidence supports a *quantum meruit* recovery. For these projects, a reasonable per hour rate is $25.00. This amount is based on contemporaneous work that Weinreich performed for the Defendants. For instance, Weinreich was paid $250.00 to work for the Defendants on a Bulova project for one day. Similarly, the evidence shows — and Weinreich does not dispute — that he worked for approximately three months on the Kiss project, for which he was paid $10,700.00. These two projects indicate that Weinreich was paid approximately $25.00 per hour for the work he did for the Defendants.

There are certain projects for which Weinreich has already been paid, and thus is not entitled to any further compensation. These project are: the Foreigner centerfold, for which he was paid $500.00; the Bulova project, for which he was paid $250.00; and the Washington Hilton project, for which he was paid $250.00. In addition, Weinreich was paid $10,700.00 for the Kiss project.

The evidence does support the conclusion that Weinreich be compensated for specific projects that he worked on. In May

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Mar Oil is misleading. There the court specifically held that the defendant attorney was *not* entitled to $200.00 per hour for 1200 hours because, in part, he had kept no time records. *Id.* at 840-43. What the Second Circuit did indicate — and which is applicable to the instant case — is that on remand the trial court should determine the number of hours the defendant attorney worked "with doubts resolved against [him] since he failed to keep time records." *Id.* at 843.

1978, Weinreich worked on the Laser Tinker Bell project. The evidence indicates that the project was designed and fabricated very quickly, and that Weinreich delivered it to the client in Philadelphia. Appropriate payment for this project is $400.00, representing two days work. In January 1979, Weinreich worked "a little bit" with Metz on a laser video report. An appropriate payment for this project is $100.00, representing a half day of work. At about the same time, Weinreich worked on a trade show booth and brochure, and also attended one of the trade shows. Except for testimony about attendance at the trade show, no evidence was introduced concerning the amount of time spent on these projects. An appropriate payment would be $1000.00, representing five days work.

Weinreich also seeks *quantum meruit* recovery for three separate projects concerning certain laser effects: a color chopper, a beam stealer and a laser chaser. Recovery is not appropriate for the work done on these projects since they were all intended to be components of the 2000 system.

In sum, Weinreich is entitled to $1,500.00 in *quantum meruit*. Weinreich is also entitled to interest on the *quantum meruit* damages. *See Govern & McDowell v. McDowell & Walker, Inc.*, 75 A.D.2d 979, 428 N.Y.S.2d 367, 368 (3rd Dep't 1980). The interest rate is six percent for pre-June 25, 1981 damages, and nine percent thereafter. CPLR § 5004. The interest is to be computed when the damages were incurred, "or upon all of the damages from a single reasonable date." CPLR § 5001 (b). An appropriate time for this interest to begin to be computed is June 30, 1979.

Appendix E

Conclusion

Judgment against the Defendants will be entered awarding Weinreich the sum of $55,687.07, and interest on that amount as set forth above. Settle judgment on notice.

It is so ordered.

New York, N.Y.
April 28, 1994

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 24, 1989

Stephen WEINREICH, Plaintiff,

v.

Richard SANDHAUS a/k/a Dick Sandhaus and Science Faction Corporation, and Dick Sandhaus Productions, Inc. and Science Faction Systems, Defendants.

No. 83 CIV. 3966 (CES).

United States District Court,
S.D. New York.

July 24, 1989.

Gerald M. Kleinbaum, New York City, for plaintiff.

Daniel Martin, Lawrenceville, N.J., for defendants.

MEMORANDUM DECISION

STEWART, District Judge.

Plaintiff Stephen Weinreich brought suit against defendants Richard Sandhaus, Science Faction Corporation ("SFC"), Dick Sandhaus Productions, Inc. ("DSPI"), and Science Faction Systems ("SFS"), alleging causes of action arising from plaintiff's involvement with defendants in the design, development, and marketing of laser light shows.[1] Defendants

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1. Plaintiff's complaint alleges five causes of action:

(Cont'd)

now move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons that follow we dismiss defendant Science Faction Systems from the action, grant defendants' summary judgment motion as to plaintiff's first, second, and third causes of action, deny defendants' summary judgment motion as to plaintiff's fourth and fifth causes of action, and deny the applications for sanctions made by both parties.

Factual Background

In late 1977 or early 1978, plaintiff and Sandhaus, along with a third party, Michael Metz, began work on the development of a laser light entertainment system — the "Silver System" — to be used by the "Foreigner" rock group on one of its upcoming tours. Both sides agree that there was a discussion among the parties to form a corporation to design and market laser light shows, and that Sandhaus was to draw up a formal agreement after the parties had established a "track record" of working together.

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First: payment to plaintiff of his "full share of the profits from the alleged joint venture;

Second: an accounting pertaining to the businesses created by the alleged joint venture;

Third: a constructive trust of the assets of defendant Science Faction and Sandhaus Productions acquired after January 1, 1978;

Fourth: payment in quantum meruit for services rendered;

Fifth: a failure "to exercise ordinary care" with regard to record-keeping and a failure to pay plaintiff his share of Science Faction's assets and profits.

Appendix F

Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defts. Memo.") at 6; Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pltf. Memo.") at 2.

On May 1, 1978 an agreement (the "May 1st Letter") was signed by both Weinreich and Sandhaus which "confirmed [the parties'] intention" that all the design work done by plaintiff for the "laser light show currently in production" was to be done in exchange for 1/3 interest in the net profits earned by sale or rental of the light show "or similar or derivative systems." The letter further stipulated that funds drawn by plaintiff were to be considered as a drawing on profits and that the letter was to govern the relationship until a more complete agreement was executed.

In June of 1978, Sandhaus had SFC incorporated to manufacture, rent, and sell laser light shows. Plaintiff asserts that between June and December of 1978, during which time plaintiff and Metz continued to design and develop projects, Sandhaus promised he would formally distribute stock in SFC to each of them. Defendants concede that discussions were held as to stock interest in SFC. Deft. Memo. at 7. However, defendants argue that plaintiff merely performed services for SFC for which he was paid and that no agreement was ever reached regarding stock distribution.

In the summer of 1979, plaintiff ceased working with SFC. On October 10, 1979, plaintiff sent Sandhaus a letter setting out a proposed commission arrangement for himself as the relationship among the three parties had not been for himself resolved." This commission agreement was not finalized.

Appendix F

In 1980, Metz filed an action in state court for an accounting and damages arising out of the same circumstances as the instant lawsuit. Metz's action was dismissed by a grant of summary judgment entered on July 26, 1984 by the Honorable Michael J. Dontzin. Plaintiff filed suit in this court in 1983.

Plaintiff alleges that a joint venture was established by the parties to create and market laser light shows. Defendants counter by stating that Weinreich and Metz were merely hired by DSPI to design the Silver System, and were duly compensated for their work.

Discussion

Defendants argue that the first, second, third, and fifth causes of action must be dismissed as too vague. Defts. Memo. at 8. Further, defendants contend that the first, third and fifth causes of action do not allege a cognizable legal theory upon which relief may be granted. Id. at 9. Accordingly, defendants assert that the first, second, third and fifth claims fail to state a claim on which relief may be granted. Id. For purposes of organizational clarity, we will discuss plaintiff's fifth cause of action first.

A. The Fifth Cause of Action

We agree with defendants that plaintiff's pleadings are not a model of clarity. Indeed, plaintiff's fifth cause of action could be construed as merely a reiteration of the first three causes of action which allege the existence of a joint venture. However, we construe plaintiff's fifth cause of action as alleging a breach of contract and as an alternative cause of action to the first three causes of action. See Fed.R.Civ.P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternatively or

hypothetically, either in one count or defense or in separate counts or defenses."); Fed.R.Civ.P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").[2]

Under Fed.R.Civ.P. 8(a)(2) a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In short, the Federal Rules require only that the defendant be given fair notice of the plaintiff's claim and upon what ground it rests. See Conley v. Gibson, 355 U.S. 41, 47 (1957). Therefore, we find, notwithstanding the inartfulness of the pleading, that there are adequate allegations in the instant complaint to fairly apprise defendants of the nature and factual basis of a breach of contract claim, and that plaintiff's fifth cause of action adequately sets forth such a claim. Accordingly, we construe plaintiff's fifth cause of action as a breach of contract claim, and deny defendants' motion to dismiss it. We turn next to the joint venture claims as set forth in the first three causes of action.

B. Joint Venture

A joint venture has been defined as "an informal partnership between two or more persons for a limited undertaking or purpose." Chromalloy American Corp. v. Universal Housing Systems of America, Inc., 495 F.Supp. 544, 549 (S.D.N.Y.1980), aff'd, 697 F.2d 289 (2d Cir.1982). The elements of a joint venture

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2. This construction is bolstered by the fact that there is an allusion to "contractual damages" in plaintiff's original memorandum of law, see Pltf. Memo. at 17, and an explicit reference to a breach of contract claim in his sur-reply. See Plaintiff's Reply Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pltf. Reply Memo.") at 6, 27-29. Further, plaintiff's correspondence with the court has made explicit references to a contract between the parties based on the May 1st Letter. See April 17, 1989 Letter of Daniel Martin at 3.

are: a mutual understanding to share profits and bear the burden of losses; joint control over property; joint contribution of property, financial resources, efforts, skill or knowledge; and an agreement manifesting the intent of the parties to be associated as a joint venture. Id.; see also Mendelson v. Feinman, 143 A.D.2d 76, 531 N.Y.S.2d 326, 328 (2d Dept.1988) (factors to be considered in determining the existence of a joint venture are the intent of the parties (express or implied), joint control and management of the company, sharing of profits and losses, and whether there was a combination of property, skill or knowledge). It has been asserted that an absence of one of the elements is fatal to a claim of the creation of a joint venture. See Precision Testing Laboratories v. Kenyon Corp., 644 F.Supp. 1327, 1348 (S.D.N.Y.1986). In assessing whether a joint venture has been created, the ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the comingled property and interest of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit. Mendelson, 531 N.Y.S.2d at 328.

It is this trust that creates a fiduciary duty which, if breached, will lead to an accounting. Id. Under New York law, "the crucial element" establishing a joint venture is the "mutual promise of the parties to share in the profits . . . and submit to the burden of making good the losses." Mallis v. Bankers Trust Co., 717 F.2d 683, 690 (2d Cir.1983) (quoting Steinbeck v. Gerosa, 4 N.Y.2d 302, 317, 175 N.Y.S.2d 1, 13 (N.Y.1958) (emphasis in original)).

Appendix F

C. Summary Judgment

Before discussing the parties' substantive arguments, a brief review of the principles governing summary judgment is appropriate. Summary judgment may not be granted unless there is no genuine issue of material fact to be tried and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). The task of the trial court in deciding a motion for summary judgment is not to try issues of fact, but rather determine whether there are issues of fact to be tried. See Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir.1989). On a motion for summary judgment the burden is on the moving party to establish the lack of any genuine issue of material fact, and summary judgment must be denied if the movant does not sustain this burden even if the adversary has not offered any opposition. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 161 (1970). In assessing the record to determine if there is a genuine issue of material fact, all factual inferences are to be drawn in favor of the party against whom summary judgment is sought. See Balderman v. U.S. Veterans Administration, 870 F.2d 57, 60 (2d Cir.1989). Summary judgment is ordinarily inappropriate where an individual's state of mind is implicated. Id. However, there is no genuine issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). That is there must be evidence on which a jury could reasonably find for the plaintiff. Id. at 252. With this in mind we turn to the parties' contentions.

D. Sharing of Losses and Intent to Form a Joint Venture

Defendants claim that there is no genuine issue of fact regarding plaintiff's agreement to share the burden of losses. They point out that Weinreich expressly stated in his deposition

that in the event there were any losses, he had no obligation, liability, or responsibility for them. April 10, 1989 Affidavit of Gerald Kleinbaum ("Kleinbaum Affidavit"), Exhibit K (Weinreich deposition at 341742). Further, defendants argue that plaintiff did not even risk losing the value of his services since he took $16,000 as a draw against anticipated net profits. Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Reply memo.") at 10. Plaintiff counters by stating that he performed services for the alleged joint venture for two years on the understanding that if the venture was not ultimately profitable he would not receive the "fair value" of his services. May 5, 1989 Affidavit of Stephen Weinreich at P 9.[3] Consequently, plaintiff contends that as an individual who offered his services for a share of net profits and risked losing the value of those services, he is considered to have fulfilled the "risk of loss" requirement under New York law. See Ramirez v. Goldberg, 82 A.D.2d 850, 852, 439 N.Y.S.2d 959, 961 (2d Dept.1981); cf. Marston v. Gould, 69 N.Y. 220, 224-25 (1877) (a share in net profits implies a participation in losses).[4]

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3. Plaintiff's submission of an affidavit by Juergen Bayer in which the affiant states that plaintiff personally assumed the payment of a DSPI bill for $900 is of little value for purposes of his contention that he was liable for losses of the joint venture. Defendant suggests that plaintiff paid the bill to preserve an ongoing individual relationship with Bayer. However, even assuming defendants' suggestion to be inaccurate, it is our view that plaintiff's voluntary payment of the DSPI bill still would not rise to the assumption of personal liability for the debts of the enterprise to third party creditors — a responsibility plaintiff expressly states he did not have. If anything, the payment of the DSPI bill tends to serve defendants' contention that all work on the Silver System was done under the auspices of DSPI.

4. Plaintiff's contention that he risked losses since he only took $16,000 as a "draw on profits" is not dispositive of whether he, in actuality, risked loss since plaintiff makes no claim that he was liable to return the amount drawn in the event the business ultimately proved unprofitable. In fact, plaintiff asserted in his

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However, we believe also relevant to an inquiry of whether a party "risked loss" is whether he also agreed to assume personal responsibility for the potential legal liabilities of the enterprise. Cf. Sitchenko v. DiResta, 512 F.Supp. 758, 762 (E.D.N.Y.1981) (partners are jointly liable with respect to partnership's contractual obligations); Pedersen v. Manitowoc Co., 25 N.Y.2d 412, 419, 306 N.Y.S.2d 903, 909 (1969) (legal consequences of joint venture almost identical with that of partnership and when tort is committed by firm the wrong is imputable to all partners jointly and severally); cf. Hanlon v. Melfi, 102 Misc.2d 170, 173, 423 N.Y.S.2d 132, 134 (N.Y. Sup.Ct. Suffolk Co.1979) (rights, duties, and liabilities of joint venture to be tested by rules substantially the same as those which govern partnership).

Plaintiff, in his deposition testimony, expressly stated that he assumed no liability nor responsibility for losses of the business. Indeed, he states that only Sandhaus had any personal liability for the debts or torts of the enterprise and that plaintiff was under no obligation to return any money advanced to him. Kleinbaum Affidavit, Exhibit K (Weinreich deposition at 22930).

It would be inequitable to allow a party to claim the rights and benefits of partnership or joint adventure, while at the same

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deposition that he was not obligated to return any monies advanced even if the debts of the business exceeded its liabilities. Kleinbaum Affidavit, Exhibit K (Weinreich deposition at 230). Obviously, if plaintiff received $16,000 free and clear, irrespective of whether there were any net profits, the amount advanced did not represent a "draw on future profits." Cf. Cassidy v. Hall, 97 N.Y. 159, 168 (1884) (a party interested in profits of a business as a means of compensation for services rendered is not a partner); Kramer v. World-Wide Trading Co., Inc., 195 A.D. 305, 308, 187 N.Y.S. 16, 19 (1st Dept. 1921) (inherent in notion of someone receiving a share of net profits in return for his services is the risk of his receiving nothing should the costs equal or exceed the gross revenues).

time, allow that party to disclaim the legal liabilities which the relationship imposes. For a party to risk the "fair value" of his services may well be equivalent to another party risking the value of his financial investment. However, it is elemental that the sharing of liability for the actions of one another in the conduct of a partnership or joint venture goes to the core of the fiduciary obligations established by such a relationship. Cf. Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1078 (2d Cir.1977) (partners owe each other the utmost good faith, fairness, and loyalty), cert. denied, 434 U.S. 1035 (1978); Crane and Bromberg, Law of Partnership s 68 (1968) ("The unique feature [partners] have in partnership is their symmetry; each partner is, roughly speaking, both a principal and an agent, both a trustee and a beneficiary, for he has the property, authority and confidence of his co-partners, as they do of him. He shares their profits and losses, and is bound by their actions. Without the protection of fiduciary duties 'each is at the others' mercy.")

In light of plaintiff's deposition testimony in which he concedes that he assumed no liability nor responsibility for the debts or obligations of the enterprise, and was not obligated to return any of the $16,000 and reimbursement monies advanced to him in the event there were no profits, we find that there is no genuine issue of material fact as to whether the plaintiff agreed to bear the burden of losses. We hold as a matter of law that he did not.

Furthermore, assuming arguendo that plaintiff's mere risk of receiving something less than the "fair value" of his labor satisfies the burden of loss requirement for joint adventurers under New York law, plaintiff's understanding that from the formation of the relationship only Sandhaus would be personally

liable for the conduct of the enterprise is clear indication that there was no intent on the part of either party to create a joint venture. The manifestation of intent to form a joint venture need not be explicit but the parties must be clear that they intend to form a fiduciary relationship and not a simple contract. See Precision Testing Laboratories, 644 F.Supp. at 1349 (citing Yonofsky v. Wernick, 362 F.Supp. 1005 (S.D.N.Y.1973)). That the parties may have agreed together to act in concert to achieve some stated economic objective is not enough by itself to create a joint venture. See Steinbeck, 4 N.Y.2d at 317, 175 N.Y.S.2d at 13 (quoting Hasday v. Barocas, 10 Misc.2d 22, 28-29, 115 N.Y.S.2d 209, 216 (N.Y. Sup.Ct. New York Co.1952)); see also Mitler v. Friedeberg, 32 Misc.2d 78, 222 N.Y.S.2d 480, 485 N.Y. Sup.Ct. New York Co.1961) (agreement to act in concert or to distribute proceeds of enterprise on a percentage basis does not constitute joint venture if enterprise does not represent joinder of property, skills and risks).

Plaintiff's admitted lack of responsibility for the potential liabilities of the business other than the risk of receiving less than the "fair value" of his labor does not create the fiduciary obligation which arises from the "coagulation of property, profits or other interests which the parties can be said to hold jointly and which are made accessible to each other in terms of the confidential relationship which exists between joint associates." Hasday, 115 N.Y.S.2d at 216. Therefore, as there is no issue of material fact as to whether the parties entered into a joint venture, we grant defendant's motion for summary judgment as to plaintiff's first three joint venture causes of action.[5]

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5. Having so decided, it is unnecessary to discuss defendants' other contentions with regard to the joint venture causes of action.

Appendix F

E. Quantum Meruit

Defendants next argue that plaintiff's quantum meruit cause of action must be dismissed since plaintiff testified at his deposition that he was not making any claim for services rendered. Defendants, citing Halloran v. Ohlmeyer, 618 F.Supp. 1214, 122021, (S.D.N.Y.1985), contend that since plaintiff's deposition testimony contradicts his affidavit, this court is required to disregard the affidavit.[6] Reply Memo. at 16. We disagree.

Q. You previously testified that you are not making any claim for compensation for services rendered in this litigation; is that correct?

A. Financial compensation, money. That is payment for services rendered.

Q. You are not making?

A. Correct.

May 20, 1989 Affidavit of Richard Sandhaus, Exhibit P (Deposition of Stephen Weinreich at p. 323).

Plaintiff's Affidavit reads in relevant part:

I clearly am making a claim for services rendered despite defendants' attempt to misconstrue my testimony to the contrary.

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6. Plaintiff's deposition testimony in relevant part reads: roughly $16,000.00 I have taken in drawings against profits.

Appendix F

What I meant in my deposition testimony was that I do not feel that my primary claim is for services rendered since I contributed those services to further my own business. However, if this court does not confirm my right to that business, I am certainly entitled to the value of my work which is far in excess of the roughly $16,000.00 I have taken in drawings against profits.

— May 5, 1989 Affidavit of Stephen Weinreich at 4-5.

In Halloran, there were factual discrepancies between the plaintiff's affidavit and his deposition testimony. In his deposition, the plaintiff in Halloran testified that an agreement contemplated an ongoing relationship, while in his affidavit, the plaintiff asserted that the same agreement contemplated only a "one-shot deal." The plaintiff in Halloran made no attempt to explain the discrepancy between his affidavit and deposition testimony. It was for this reason that the district court stated that the factual claims in the affidavit must be disregarded. Halloran, 618 F. Supp. at 1220-21. Further, it was in this context that the district court found that the policy issues enunciated by the Second Circuit regarding such discrepancies were implicated. In Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) the Second Circuit stated:

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Here, the plaintiff's "contradictory" statements are not factual averments but rather a layperson's interpretation of his claims. Further, any potential contradictions with his deposition

testimony were expressly explained by plaintiff in his affidavit. Therefore, the concerns of the Second Circuit are not implicated. As such, defendant's argument urging dismissal of plaintiff's fourth cause of action sounding in quantum meruit is without merit, and we deny summary judgment as to that claims.[7]

Defendants also move for dismissal of defendant Science Faction Systems from the action on the ground that no such entity ever existed. Plaintiff does not contradict this assertion nor does plaintiff oppose such relief. Pltf. Memo. at 1. Accordingly, we dismiss defendant Science Faction Systems from the action.

F. Rule 56(g)

Finally, plaintiff asserts in his memorandum of law, without bringing a formal motion, that defendants should be required to

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7. Defendants citing City of Yonkers v. Otis Elevator Co., 844 F.2d 42 (2d Cir. 1988), and Radio Today, Inc. v. Westwood One, Inc., 684 F. Supp. 68 (S.D.N.Y. 1988), argue that plaintiff's quasi-contract cause of action must be dismissed as a matter of law because an action for quantum meruit is precluded where the subject matter is covered by an express agreement. Defendants' Supplemental Memorandum of Law at 11-12. This argument is without merit. In both Otis Elevator and Radio Today the court found that plaintiff's quasi-contract cause of action could not be maintained in view of the fact that a valid contract existed covering the same subject matter. Here, one of the issues remaining in the case is whether the May 1st Letter constitutes a valid contract between the parties and whether defendants have breached it. Indeed, defendants characterize the May 1st Letter as only a "preliminary agreement to agree." Id. at 13. Therefore, defendants' assertion that plaintiff's mere allegation that a valid contract exists precludes an alternative quantum meruit cause of action, is without merit. Cf. Marcella v. ARP Films, Inc., 778 F.2d 112, 117 (2d Cir. 1985) (party may submit case on both breach of contract and quantum meruit grounds).

pay costs and attorney's fees pursuant to Fed. R. Civ. P. 56(g).[8] Specifically, plaintiff objects to a statement in the April 10, 1989 affidavit of defendant Sandhaus which asserts that DSPI paid all the manufacturing and production expenses of the Silver System, and that the Silver System generated only $6000 of rental income, see Pltf. Memo. at 18, and statements in the May 20, 1989 affidavit of defendant Sandhaus (the "May 20th affidavit") in which Sandhaus states that he did not recall making a statement that the 2000 series projectors did not utilize closed loop scanners. See Pltf. Reply Memo. at 31-33.

Plaintiff states that he paid $900 of the Silver System expenses and that the Silver System generated at least an additional $6300 in rental income than defendants acknowledge in the May 20th affidavit. Id. at 31. Plaintiff also points out that Sandhaus testified in deposition that the 2000 Series did, in fact, use closed loop scanners. Id. at 32-33.

As an initial matter, the allegedly erroneous statements in the affidavits have no material affect on the disposition of this motion. This is a sufficient basis to deny plaintiff's application. See Faberge, Inc. v. Saxony Products, Inc., 605 F.2d 426, 429 (9th Cir. 1979) (Rule 56(g) sanctions not applied where affidavit did

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8. Fed. R. Civ. P. 56(g) reads in relevant party:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party, including reasonable attorney's fees. . . .

not prejudice disposition of motion even if court assumed it was submitted in bad faith); see also 10A C. Wright & A. Miller, Federal Practice and Procedure s 2742 (2d ed. 1983). Second, the statements to which plaintiff objects, particularly regarding the closed loop scanners, are in an ambiguous context making a definitive assessment of their accuracy at this juncture difficult. Moreover, even assuming the statements in the affidavits are inaccurate, we are not convinced that the affidavits supporting the instant motion were submitted in bad faith or for a dilatory purpose. As such, we decline to assess Rule 56(g) sanctions against defendants.

Defendants assert, also without bringing a formal motion and without reference to authority, that plaintiff's attempts to create "spurious issues" by raising the Rule 56(g) application warrant the imposition of costs and fees against plaintiff. Upon consideration, we decline to impose such sanctions.

Conclusion

For the reasons articulated above:

1. The motion for summary judgment pursuant to Fed. R. Civ. P. 56 by defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation, Dick Sandhaus Productions, Inc., and Science Faction Systems is granted as to the first, second, and third causes of action;

2. The motion for summary judgment by defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation, Dick Sandhaus Productions, Inc., and Science Faction Systems is denied as to the fourth and fifth causes of action;

3. Defendant Science Faction Systems is dismissed as a defendant from the action;

4. Plaintiff Stephen Weinreich's application for sanctions pursuant to Fed. R. Civ. P. 56(g) is denied;

5. Defendants' request for costs and attorney's fees is denied.

SO ORDERED.

(2)

Supreme Court, U.S.
FILED
SEP 5 1995
CLERK

No. 95-189

In The

Supreme Court of the United States

October Term, 1995

RICHARD SANDHAUS a/k/a DICK SANDHAUS, and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Petitioners,

vs.

STEPHEN WEINREICH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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10 90

QUESTIONS PRESENTED

1. Did the district court abuse its discretion in dealing with the issue of piercing the corporate veil, where the veil piercing issue was:

(1) Raised in respondent's complaint;

(2) Dealt with extensively in pre-trial discovery by both sides;

(3) Dealt with extensively at trial by both sides through the testimony of witnesses, the introduction of evidence by petitioners themselves on the issue, and the introduction without objection of voluminous documentary evidence by respondent bearing solely on the veil piercing issue;

(4) Briefed by both sides in post-trial closing arguments?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 7

I. Respondent's complaint and the pre-trial order alleged sufficient facts to put petitioners on clear notice that he was seeking to pierce the corporate veil to reach petitioners SFC and Sandhaus. 7

II. The district court did not abuse its discretion under Rule 15(b) in finding that the issue of piercing the corporate veil had been tried by consent. 10

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Arkla Exploration Co. v. Boren, 411 F.2d 879 (8th Cir. 1969) 13

Bradford Audio Corp. v. Pious, 392 F.2d 27 (2nd Cir. 1968) 12

Contents

	Page
Cole v. Layrite Prod. Co., 439 F.2d 958 (9th Cir. 1971) ...	11
Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957)	8
Cornick v. Hi-Grade Cleaners Inc., 595 F. Supp. 718 (N.D. Ill. 1984)	8
Dell v. Heard, 532 F.2d 1330 (10th Cir. 1976)	14, 15
Dunn v. Transworld Airlines, Inc., 589 F.2d 408 (9th Cir. 1979)	13
Ellis v. Arkansas Louisiana Gas Co., 609 F.2d 436 (10th Cir. 1979)	11
Federal Savings & Loan Insurance Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973)	13
Fejta v. G.A.F. Companies, Inc., 800 F.2d 1395 (5th Cir. 1986)	13
Fowler v. Sponge Products Corp., 246 F.2d 223 (1st Cir. 1957)	11
Hall v. National Supply, 270 F.2d 379 (5th Cir. 1959)	11
Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982)	12, 17
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981)	13

Contents

	Page
Knudson v. Boren, 261 F.2d 15 (10th Cir. 1958)	13
Laffey v. Northwest Airlines Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 98 S. Ct. 1281, 434 U.S. 1086, 58 L. Ed. 2d 792 (1976)	11
Lones v. Detroit, Toledo & Ironton R. Co., 398 F.2d 914 (6th Cir. 1968), *cert. denied*, 89 S. Ct. 714, 393 U.S. 1063, 21 L. Ed. 705 (1969)	11
Matter of Prescott, 805 F.2d 719 (7th Cir. 1986)	12
Mineral Industries, Etc. v. Occupational Safety, 639 F.2d 1289 (5th Cir. 1981)	15
Morris v. New York State Department of Taxation and Finance, 82 N.Y. 2d 135, 603 N.Y.S. 2d 807 (1993) ...	3, 8
Neidland v. Unitd States, 338 F.2d 254 (3rd Cir. 1964) ...	15
Nielson v. Armstrong Rubber Co., 570 F.2d 272 (8th Cir. 1978)	11
Pariser v. Christian Health Care Systems, Inc., 816 F.2d 1248 (8th Cir. 1987)	18
Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), *affirmed on other grounds sub. nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 64 (1977)	15, 16

Contents

	Page
St. Joe Minerals Corp. v. Occupational Safety and Health Review Commissioner, 647 F.2d 840 (8th Cir. 1981) ..	15
Stepp v. United States, 297 F.2d 909 (4th Cir. 1953), *cert. denied*, 74 S. Ct. 627, 347 U.S. 933, 98 L. Ed. 1084 (1954)	11
Sunstream Jet Express v. Int'l Air Service Co., Ltd., 734 F.2d 1258 (7th Cir. 1984)	11
United States v. For Use of Seminole Sheet Metal v. SCI., Inc., 828 F.2d 671 (11th Cir. 1987)	17
United States v. 47 Bottles, 320 F.2d 564 (3rd Cir. 1963) ..	11
Usery v. Marquette Cement Mfg. Co., 568 F.2d 902 (2nd Cir. 1977)	15
Vogrin v. Hedstrom, 220 F.2d 863 (7th Cir. 1955), *cert. denied*, 350 U.S. 845, 76 S. Ct. 86, 100 L. Ed. 753 (1955)	12
Wallin v. Fuller, 476 F.2d 1204 (5th Cir. 1973)	17
Weissman v. Freeman, 868 F.2d 1313 (2nd Cir. 1989)	11
Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc., 833 F.2d 1484 (11th Cir. 1987)	18

Contents

Page

Rules Cited:

Federal Rule of Civil Procedure 8(a)(2) 7

Federal Rule of Civil Procedure 15(b) .....
.....10, 11, 12, 14, 15, 16, 17, 18

APPENDIX

Appendix A — Verified Complaint 1a

Appendix B — Excerpts of Deposition of Stephen Weinreich 8a

Appendix C — Excerpts of Deposition of Richard Sandhaus 19a

Appendix D — Excerpts of Trial Transcript Dated January 12, 1994 ..... 33a

Appendix E — Excerpts of Trial Transcript Dated January 14, 1994 ..... 36a

Appendix F — Trial Exhibit 20 ..... 40a

Appendix G — Trial Exhibit 31 ..... 41a

Appendix H — February 11, 1994 Letter from Gerald Kleinbaum to Judge Sweet with Handwritten Note ... 44a

Appendix I — Excerpted Defendants' Post Trial Memorandum of Law with Proof of Service 46a

Contents

	Page
Appendix J — Excerpted Defendants' Proposed Findings of Fact and Conclusions of Law	49a
Appendix K — May 1, 1978 Agreement	52a
Appendix L — Excerpted Joint Pre-Trial Order	53a
Appendix M — Excerpts of Closing Arguments and Briefs	58a
Appendix N — Excerpts of Deposition of Richard Sandhaus	64a
Appendix O — Excerpted January 11, 1994 Trial Transcript (Admission of Exhibits)	67a
Appendix P — Excerpted January 13, 1994 Trial Transcript	71a
Appendix Q — List of Plaintiff's Trial Exhibits	76a

TO THE HONORABLE SUPREME COURT:

Respondent, Stephen Weinreich, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by petitioners.

STATEMENT OF THE CASE

The issue of piercing the corporate veil to hold petitioners Richard Sandhaus ("Sandhaus") and Science Faction Corporation ("SFC") liable for contractual damages was first raised in respondent's Complaint. Though the specific words "piercing the corporate veil" were not used, respondent alleged sufficient facts to put petitioners on notice that he sought to pierce the corporate veil to hold Sandhaus and SFC liable under the May 1, 1978 contract between respondent and petitioner Dick Sandhaus Production, Inc. ("DSPI") (Agreement at Appendix K at 52a).

The complaint alleged that DSPI and SFC were affiliated companies, (paragraph 2), that Sandhaus was the principal of both (paragraph 4), that Sandhaus formed SFC to perform the same functions, and utilize the same assets as DSPI, (paragraph 11), and that Sandhaus commingled the assets of DSPI, SFC and himself personally, in order to deprive respondent of his rightful share of profits (paragraph 18) (Appendix A at 1a, 2a, 3a, 5a).

The veil piercing issue was also addressed by both sides in pre-trial discovery. Respondent was asked in a pre-trial deposition to explain the allegations of commingling contained in paragraph 18 of the Complaint. He testified that though the Silver System and its attendant technology was built by DSPI, "... it somehow drifted across the lines of the two corporations..." and came to be owned and exploited for profit by Sandhaus and SFC (Appendix B at 12a). This testimony went to the very heart of the veil piercing claim since respondent was

entitled under the contract between himself and DSPI to a 1/3 share of the profits derived from the sale or rental of the Silver System and all similar of derivative systems. The District Court characterized the circumstances surrounding the "purported sale" of the Silver System from DSPI to SFC as "suspect," and relied heavily on the suspect transfer of the key asset in the case from one dominated corporation to the other, in concluding that the corporate veil should be pierced (4/28/94 Opinion at Petitioners' Appendix E at 40a).

Respondent also testified in the same pre-trial deposition that the two corporations shared office space, and that he ". . . saw no attempt nor actual separation of the uses of equipment or furniture or anything else between the corporations, or for that matter Dick Sandhaus personally." (Appendix B at 15a).

The District Court cited the sharing of office space as another factor in its decision to pierce the corporate veil (Petitioners' Appendix E at 40a.)

Petitioner Sandhaus was also deposed on the veil piercing issue prior to trial. He was asked about the relationship between DSPI and SFC, specifically whether SFC was a subsidiary or affiliate of DSPI (Appendix C at 21a-24a). He was asked about the sharing of office space (Appendix C at 27a-30a) and he was asked about the "suspect" transfer of the Silver System from DSPI to SFC (Appendix N at 64a-66a).

Despite two pre-trial motions for summary judgment by petitioners, respondent's veil piercing claim survived to trial. In his July 24, 1989 decision on petitioners' first summary judgment motion, Judge Stewart narrowed the issues in the case by dismissing respondent's joint venture claims. However respondent's claim against SFC for breach of the May 1, 1978 written agreement was not dismissed. Since SFC was not a

signatory to the agreement (in fact it was not even in existence on May 1, 1978 when the agreement was signed) the only possible basis for a breach of contract claim against SFC was that petitioner Sandhaus had used his domination and control over DSPI and SFC to commingle the assets of the two corporations in order to deprive respondent of his rightful share of profits under the agreement. In the joint pre-trial order signed by Judge Sweet on November 29, 1993, SFC remained a defendant on the contract claim. The pre-trial order included the uncontested fact that Sandhaus was the president and sole shareholder of both DSPI and SFC. (Appendix L, Facts (3) and (4) at 55a). It also included the key factual allegation necessary for respondent's veil piercing claim;

> . . . defendant Sandhaus transferred the Silver System as an asset from defendant DSPI to defendant SFC without consideration.

(Appendix L at 56a, Contested Fact (7).

These allegations were sufficient under New York law to pierce the corporate veil. New York law on veil piercing was misstated by petitioners at page 4 of their Petition. In fact there are only two, not three, essential elements of a veil piercing claim in New York under *Morris v. New York State Department of Taxation and Finance*, 82 N.Y. 2d 135, 603 N.Y.S. 2d 807 (1993):

> . . . (1) The owners exercised complete domination of the corporation in respect to the transaction attacked; and
>
> (2) That such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.

Clearly the allegations of total control of DSPI and SFC by Sandhaus, and the use of Sandhaus' total control to deprive respondent of his rightful share of profits under the agreement, by wrongfully transferring the Silver System from DSPI to SFC, were sufficient to put petitioners on notice going into the trial that respondent was seeking to pierce the corporate veil to hold all petitioners liable under the agreement between DSPI and respondent.

Moreover, the fact that veil piecing was an issue in this case was conclusively established by the actions of both sides at trial.

Much, if not most of respondent's evidence, admitted without objection by petitioners, was offered to establish the liability of SFC and Sandhaus personally under the agreement. A partial list of evidence offered by respondent under the veil piercing theory includes:

- 118 contracts between *SFC* and its customers for the sale or rental of laser light show systems under the agreement (Appendix O at 69a – admission of exhibits at trial, Appendix Q at 80a-82a – partial list of trial exhibits).

- 99 Reports filed by *SFC* with the U.S. Bureau of Radiological Health ("BRH") evidencing rentals by SFC of laser light show systems covered by the agreement; (Appendix O at 68a, Appendix Q at 76a-80a). The District Court relied on certain of these contracts and BRH reports in awarding contractual damages against petitioners (June 30, 1994 Opinion at Petitioner's Appendix D at 10a).

- A DSPI tax return establishing that for a period during which SFC and DSPI shared office space, DSPI's rent

was paid by SFC, a fact relied upon by the district court in piercing the corporate veil (Petitioners' Appendix E at 39a).

- A letter written on DSPI stationery to the BRH, requesting a regulatory variance for SFC (Appendix G at 41a). This letter was also relied upon by the district court in its decision to pierce the corporate veil; (Petitioners' Appendix E at 40a).

- A product brochure designating SFC as an "affiliate" of DSPI. This brochure, about which petitioner Sandhaus was questioned in his pre-trial deposition (Appendix F at 40a) was also relied upon by the trial court in piercing the corporate veil. (Petitioners' Appendix E at 40a).

Petitioners never once objected to any of this evidence. Moreover, petitioners offered their *own evidence* on the veil piercing issue, evidence which was not even arguably relevant to any other issue at trial. Specifically petitioner Sandhaus testified as follows at trial:

> Since its organization and through the period that it was actively engaged in business, did DSPI maintain its own bank accounts?
>
> Yes
>
> And did it maintain its own records of receipts and disbursements and general ledgers?
>
> Yes
>
> Did it file tax returns in its name?
>
> Yes. . . .
>
> Do you recall whether there are any officers or directors of DSPI other than yourself?

I believe, though I am not certain, that my father and/or sister are officers.

With respect to Science Faction Corporation, since its organization has it maintained its own bank accounts?

Yes

And since its organization, has it maintained its own financial records, including ledgers?

Yes

Has it filed its tax returns in its own name?

Yes

Do you know whether or not there are any officers and directors of Science Faction Corporation other than yourself?

Again, I am not certain, but it is possible that either my sister and/or father are officers.

When it was first incorporated, do you recall that was the case?

I believe that when it was first incorporated, my father and an attorney named John Dasher appeared as officers.

(Appendix E at 37a-39a).

The fact that DSPI and SFC maintained separate bank accounts and other financial records, filed separate tax returns and had their own officers and directories, was relevant to one issue and one issue alone — whether the corporate veil should be pierced.

Moreover, any doubt that the above testimony concerned the corporate piercing issue alone, was removed by petitioners' own post-trial written arguments in which they *specifically cited* this testimony in arguing that the corporate veil should not be pierced. (Appendix I, Petitioners' Post-trial Memorandum at 47a, Appendix J, Petitioners' Proposed Findings of Fact and Conclusions of Law at 50a). The testimony was not mentioned anywhere else in petitioners' post-trial submissions. Petitioners' claim that they only addressed the veil piercing issue in their post-trial submissions in response to respondent's raising it for the first time in his post-trial brief, is belied by the fact that petitioners' post-trial submissions were not made in response to respondent's brief (Appendix H at 44a-45a, handwritten note from petitioners' attorney at the bottom of letter to Judge Sweet dated 2/11/95).

Respondent, of course, also briefed the corporate piercing issue in his post-trial brief (Appendix M at 59a-63a).

At no time, either at trial, or in their post-trial briefs and motions, did petitioners ever object to consideration by the District Court of the veil piercing issue.

REASONS FOR DENYING THE WRIT

I.

RESPONDENT'S COMPLAINT AND THE PRE-TRIAL ORDER ALLEGED SUFFICIENT FACTS TO PUT PETITIONERS ON CLEAR NOTICE THAT HE WAS SEEKING TO PIERCE THE CORPORATE VEIL TO REACH PETITIONERS SFC AND SANDHAUS.

Under F.R.C.P. 8(a)(2), as interpreted by this Court, a complaint provides sufficient notice that a claim is being raised if it provides petitioners with:

> . . . fair notice of what plaintiffs' claim is and the grounds upon which it rests.

Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 102 (1957).

As set forth above, the New York Court of Appeals held in *Morris v. New York State Department of Taxation and Finance*, that there are two essential elements of a veil piercing claim under New York law:

> (1) Complete domination of the corporation with respect to the transaction in question; and
>
> (2) The use of such domination to commit a fraud or wrong against the plaintiff.

Morris, supra at 810-811.

Thus, in order for respondent's Complaint to have put petitioners on notice of a veil piercing claim, it had only to allege the domination by Sandhaus of SFC and DSPI, and the use of that domination to commit a wrong against respondent (*cf. Cornick v. Hi-Grade Cleaners Inc.*, 595 F. Supp. 718, 721 (N.D. Ill. 1984) — Complaint sufficient to state a claim for piercing the corporate veil where all three elements necessary for a veil piercing claim under Illinois law alleged in the complaint.).

In the instant case, sufficient facts were clearly alleged in respondent's complaint to put petitioners on notice of a veil piercing claim.

The allegation of control of SFC and DSPI was contained in paragraph 4 of the Complaint.

The use of such control to commit a fraud or wrong against respondent was alleged in:

(1) Paragraph 11 which alleged that Sandhaus formed SFC specifically to perform the same functions and utilize the same assets as DSPI with respect to the agreement between respondent and DSPI;

(2) Paragraph 18 which alleged that Sandhaus commingled the assets of DSPI, SFC and himself personally, in order to deprive respondent of his rightful share of profits under the agreement; and

(3) Paragraph 2 which alleged that SFC and DSPI were affiliated companies.

These allegations were clearly sufficient to put petitioners on notice that respondent sought to pierce the corporate veil and hold Sandhaus and SFC liable under the agreement between DSPI and respondent. In fact when petitioners argued in their Post-Trial Memorandum that the corporate veil should not be pierced they used the same language used by respondent in his Complaint, *commingling of assets*: ". . . there is no evidence that the business affairs of DSPI or SFC were *commingled* warranting the Court to disregard the separate corporate identities of those corporations." (Petitioners' Post Trial Memorandum, Exhibit I at 47a, emphasis supplied). Thus petitioners cannot now argue that they were not put on notice that respondent was seeking to pierce the corporate veil by the allegations of commingling in the Complaint.

Moreover, petitioners cannot deny that they were on notice of a veil piercing claim, since they addressed the issue in pre-trial discovery. Petitioners specifically asked respondent to explain the allegations of commingling in paragraph 18 of the Complaint,

in his pre-trial deposition. Respondent explained that by commingling he meant that though the Silver System and its attendant technology was built and developed by DSPI, Sandhaus used his control over both corporations to transfer it to SFC where it generated millions of dollars in revenue (Appendix B at 12a). Sandhaus too was asked in pre-trial depositions about the use of his control of DSPI and SFC to transfer the Silver System, under suspect circumstances, from one corporation to the other, a transaction which if allowed to stand would result in the denial of all recovery by respondent under the agreement (Exhibit N at 64a-66a).

The veil piercing issue was then preserved in the Pre-Trial Order wherein SFC remained a defendant in the breach of contract claim although it was not a party to the agreement and in fact did not even exist on May 1, 1978 when the agreement was signed. Since the only possible theory for a breach of contract claim against SFC was veil piercing, petitioners were clearly on notice that this claim remained. The essential facts for a veil piercing claim were also alleged in the Pre-Trial Order; Sandhaus' total control over DSPI and SFC was stated as an uncontested fact, and the transfer by Sandhaus of the Silver System for no consideration was alleged as a contested fact (Appendix L at 55a-56a).

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER RULE 15(b) IN FINDING THAT THE ISSUE OF PIERCING THE CORPORATE VEIL HAD BEEN TRIED BY CONSENT.

As set forth above the issue of piercing the corporate veil was sufficiently raised in respondent's complaint, elaborated upon in discovery, and preserved in the Pre-Trial Order.

However, even if the issue had not been raised prior to trial, it was clearly tried by consent under Rule 15(b) which reads in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

In this case, the issue of piercing the corporate veil was tried by both the express and the implied consent of petitioners. Therefore it was entirely proper for the District Court to treat the issue as if it had been raised in the pleadings.

It is the law in every Circuit that a District Court's decision to try an issue not raised in the pleadings under Rule 15(b) will only be reversed for an abuse of discretion (*Fowler v. Sponge Products Corp.*, 246 F.2d 223 (1st Cir.1957); *Weissman v. Freeman*, 868 F.2d 1313,1326 (2nd Cir.1989); *United States v. 47 Bottles*, 320 F.2d 564 (3rd Cir. 1963); *Stepp v. United States*, 297 F.2d 909 (4th Cir. 1953), *cert. denied*, 74 S. Ct. 627, 347 U.S. 933, 98 L. Ed. 1084 (1954); *Hall v. National Supply*, 270 F.2d 379 (5th Cir. 1959); *Lones v. Detroit, Toledo & Ironton R. Co.*, 398 F.2d 914 (6th Cir. 1968), *cert. denied*, 89 S. Ct. 714, 393 U.S. 1063, 21 L. Ed. 705 (1969); *Sunstream Jet Express v. Int'l Air Service Co., Ltd.*, 734 F.2d 1258, 1272 (7th Cir. 1984); *Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 276 (8th Cir. 1978); *Cole v. Layrite Prod. Co.*, 439 F.2d 958 (9th Cir. 1971); *Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436, 439 (10th Cir. 1979); *Laffey v. Northwest Airlines Inc.*, 567 F.2d 429, 477 (D.C. Cir. 1976), *cert. denied*, 98 S. Ct. 1281, 434 U.S. 1086, 58 L. Ed. 2d 792 (1976)).

In this case, it is absolutely clear from the record below that the issue was tried by consent and the District Court did not abuse its discretion in deciding the issue under Rule 15(b).

A simple test for consent under Rule 15(b) was set forth by the Tenth Circuit in *Hardin v. Manitowoc - Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982):

> The test of consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment.

Cf. Matter of Prescott, 805 F.2d 719, 725 (7th Cir. 1986).

Where as here, petitioners themselves offered evidence on the veil piercing issue during the trial, and argued the merits of the issue in post-trial briefs, consent under Rule 15(b) is clear:

> Consent *will* . . . be found when the party opposing the amendment himself produces evidence on the new issue.

Hardin, supra at 1457, emphasis supplied.

The reason for this rule is obvious. When a party itself introduces evidence on an issue, it cannot later claim that it had no notice that the issue was in the case:

> ". . . she introduced evidence as to compensation agreed to be paid by her for her transportation. *She, of course, could not be heard to say that the evidence was not addressed to a pertinent issue."* [*Vogrin v. Hedstrom*, 220 F.2d 863, 866 (7th Cir. 1955), *cert. denied*, 350 U.S. 845, 76 S. Ct. 86, 100 L. Ed. 753 (1955) emphasis supplied. *Accord Bradford Audio Corp v. Pious*, 392 F.2d 27, 73 (2nd Cir. 1968).].

"... the appellant itself put into evidence all of the state court record of the proceedings ..." [*Dunn v. Transworld Airlines, Inc.*, 589 F.2d 408, 413 (9th Cir. 1979)].

"The airline itself raised the issue ... in its own Trial Memorandum..." [*Fejta v. G.A.F. Companies, Inc.* 800 F.2d 1395, 1396 (5th Cir. 1986); *Federal Savings & Loan Insurance Corp. v. Hogan*, 476 F.2d 1182, 1188 (7th Cir. 1973)].

"... The fact that the issue ... was raised by the plaintiff during the trial .... precludes plaintiff from asserting Fed.R.Civ.P. Rule 8(c) as a bar ... because the issue was *necessarily* tried with the *express consent* of the plaintiff." [(citations omitted emphasis supplied); *Knudson v. Boren*, 261 F.2d 15, 19 (10th Cir. 1958); *Arkla Exploration Co. v. Boren*, 411 F.2d 879, 883 (8th Cir. 1969)].

"Both parties without objection offered evidence on the ... issue ..." [*Herrera v. Valentine*, 653 F.2d 1220, 1223 (8th Cir. 1981)].

As set forth above, petitioners put forth their own evidence on the veil piercing issue. Specifically, petitioner Sandhaus testified that SFC and DSPI maintained their own bank accounts, receipts and disbursement journals, and general ledgers, that each corporation filed its own tax returns, and that each had its own officers and directors (Appendix E at 37a-39a).

This testimony was not even arguably relevant to any other

issue at trial, and establishes without doubt that petitioners were clearly on notice that respondent was seeking to pierce the corporate veil between the corporations. In fact petitioners cannot even attempt to argue that the above testimony related to any other issue at trial, since they cited this testimony in *only one* section of each of their two post trial submissions, *the section in which they argued that the corporate veil should not be pierced:*

> 208. There is no basis on which the Court may disregard the separate corporate identities of SFC and DSPI. Each corporation maintained its own records, its own bank accounts, filed its own tax returns, and maintained separate records and books of account.

(Petitioners' February 14, 1994 Proposed Findings of Fact and Conclusions of Law, Appendix J at 50a). (*See also,* Petitioners' Post-Trial Memorandum of Law at Point IX, Appendix I at 47a).

Thus, there is no question that petitioners introduced their own evidence specifically on the corporate veil issue, and therefore that they consented to the trial of the issue.

Moreover, the fact that petitioners briefed the issue in their Post-Trial Memorandum independently established their consent to the trial of the veil piercing issue under Rule 15(b) (*cf. Dunn v. Transworld Airlines supra* at 413: "The airline itself raised the issue . . . in its own trial memorandum" *Dell v. Heard,* 532 F.2d 1330,1332 (10th Cir. 1976): ". . . the appellant responded to the defense in a memorandum submitted to the Court. Consequently, we hold that the issue was tried by the implied consent of the parties."

Consent to trial of an issue under Rule 15(b) may also be implied by a party's failure to object to evidence offered by the

other side on the issue, ". . . as long as the non-objecting party was fairly apprised that the evidence went to the unpleaded issue." *Neidland v. United States*, 338 F.2d 254, 258 (3rd Cir. 1964); *accord Mineral Industries, Etc. v. Occupational Safety*, 639 F.2d 1289,1293 (5th Cir. 1981); *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 906 (2nd Cir. 1977); *St. Joe Minerals Corp. v. Occupational Safety and Health Review Commission*, 647 F.2d 840, 844 (8th Cir. 1981); *Dell v. Heard, supra*; *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1308 (9th Cir. 1975), *affirmed on other grounds sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 64 (1977).

In this case respondent introduced voluminous evidence relevant to the veil piercing issue including 118 contracts between SFC and third parties for the sale or rental of laser light show systems, 99 reports filed by SFC with the BRH evidencing rentals, a letter written on *DSPI* stationery seeking a regulatory variance for *SFC*, a product brochure designating SFC and DSPI as affiliates, and a DSPI tax return establishing that SFC made rental payments for DSPI.

Petitioners never once objected to any of this evidence when it was introduced at trial, and their failure to object was properly used to infer consent for the veil piercing issue to be tried under Rule 15(b).

Moreover, petitioners also failed to object in their Post-Trial Memorandum and Proposed Findings of Fact and Conclusions of Law, to the issue being raised.[1] In *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *affirmed on other grounds sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed.

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1. In fact as set forth above, in their post-trial briefs, defendants not only failed to object to the veil piercing issue being raised, they substantively addressed the substance of the issue in their submissions.

2d 64 (1977), the Ninth Circuit held that such a failure to object may in and of itself infer consent under Rule 15(b):

> By failing to object, Rath may be deemed to have acquiesced in an expansion of the issues by the court from those set forth in the pre-trial order.

Rath, at 530 F.2d 1308.

Petitioners' claim that the Second Circuit's affirmation of the District Court's decision to try the issue, is in conflict with decisions in other Circuits, is totally without merit, for several reasons.

First, the District Court's decision to try the corporate piercing issue was not based, as suggested by petitioners, exclusively on petitioners' failure to object to evidence on the issue at trial. The issue was raised in the pleadings, dealt with in discovery, preserved in the pre-trial order, and petitioners themselves put in evidence on the issue at trial, and argued the issue in their Post-trial submissions. There was therefore ample basis, apart from petitioners' failure to object to respondent's evidence on the issue, for the District Court to infer consent under Rule 15(b).

Secondly, respondent's evidence on the veil piercing issue, was in fact predominantly, and in some cases exclusively, relevant to that issue alone. The DSPI tax return, establishing that SFC paid DSPI's taxes during a period of time when the two supposedly separate corporations shared office space, was clearly relevant only to the veil piercing issue, and petitioner Sandhaus was examined on this issue with respect to those tax returns at trial (Appendix P at 71a-73a). Similarly, the SFC product brochure, (Appendix F at 40a), though it was also used at

trial to identify a product, was principally relevant because it characterized SFC and DSPI as affiliates, a characterization cited by the District Court in its decision to pierce the corporate veil. And the 118 contracts and 99 BRH filings in the name of SFC, were also relevant *only if* the corporate veil was pierced, since SFC was not a direct party to the agreement. Finally, the letter on DSPI stationery, written by petitioner Sandhaus on behalf of DSPI, (Appendix G at 41a), though arguably relevant to other trial issues, was clearly most relevant to the veil piercing issue, as evidenced by the fact that is was cited by the District Court only in relation to that issue (Petitioners' Appendix E at page 40a).

Petitioners' argument, that simply because evidence relevant to an unpleaded issue may also have been peripherally relevant to an issue which was pleaded, a party's failure to object to such evidence may never be used to infer consent to the trial of the unpleaded issue, is contrary to clear case law. As stated above, the test as to when consent may be inferred under Rule 15(b) is a simple one — if the opposing party was aware that the issue was being raised, and he failed to object, consent may be inferred. *Hardin v. Manitowoc, supra* at 456. Thus, even where evidence may have been peripherally relevant to a pleaded issue, if the evidence was so obviously relevant to an unpleaded issue that the opposing party should have known that the unpleaded issue was being raised, a failure to object may be used to infer consent (*United States v. For Use of Seminole Sheet Metal v. SCI., Inc.*, 828 F.2d 671, 677 (11th Cir. 1987): ". . . . the evidence . . . was much more strongly relevant to the theory that the subcontract required SCI to transmit that payment to Floridaire, 'and this should have been apparent to defense counsel' "citing and quoting *Wallin v. Fuller,* 476 F.2d 1204, 1210 (5th Cir. 1973).

In this case, it not only "should have been apparent to defense counsel" that the veil piercing issue was being raised, it clearly *was* apparent, since respondent explicitly raised the issue

in his post-trial brief, and petitioners' offered their own evidence on the issue at trial, and argued the issue in their own post-trial submissions.

The cases cited by petitioners are clearly distinguishable from the instant case. In *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484 (11th Cir. 1987), principally relied upon by petitioners, the key factor cited by the Eleventh Circuit in refusing to allow the trial of an issue by consent, was the fact that the attorney for the party seeking to try the unpleaded issue, did not raise the issue in his closing arguments (*Wesco* at 1487). In this case respondent not only offered evidence on the veil piercing issue at trial, he also argued the issue extensively in post-trial arguments (Appendix M at 58a-63a).

Similarly, in the other cases cited by petitioners, the decision not to try an issue by consent under Rule 15(b) was based on a finding that the opposing party was not aware that a new issue was being raised, when he failed to object to the introduction of evidence (*cf. Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987): "Here we find *nothing* in the transcript to indicate that Pariser intended to try a tortious-interference claim or that the defendant in any way consented to trial of such a claim." (emphasis supplied).

In contrast the record in this case is full of clear indications that respondent intended to raise the corporate piercing issue — allegations in the Complaint, questions put to petitioner in pre-trial depositions, alleged facts in the pre-trial order, voluminous evidence introduced at trial, and extensive post-trial arguments on the issue. The record is also full of clear indications that petitioners consented to the trial of the issue — their own deposition questioning on the issue, the introduction of their own evidence on the issue, and the post-trial arguments they made on the issue.

CONCLUSION

For all of the reasons set forth above, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DANIEL MARTIN
Counsel of Record
Attorney for Respondent
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APPENDIX A — VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC., and SCIENCE FACTION SYSTEMS,

Defendants.

VERIFIED COMPLAINT

Stephen Weinreich, as the Plaintiff herein, by his attorneys, Sandback & Birnbaum, for his complaint, upon his own knowledge and upon information and belief, respectfully alleges as follows:

1. That at all times hereinafter mentioned, plaintiff was and is a resident of the State of New Jersey, and currently resides in the Town of Monmouth Junction, State of New Jersey.

2. That at various times hereinafter mentioned, defendant Science Faction Corporation, an affiliate of defendant Dick Sandhaus Productions Inc., (hereafter "Science Faction") was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, which at various times and from time to time has conducted business at various locations within the City, County and State of New York, including 445 Park Avenue, and 333 West 52nd Street, New York, New York.

Appendix A

3. That at various times hereinafter mentioned, defendant Dick Sandhaus Productions, Inc., (hereafter "Sandhaus Productions"), was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has at various times had its principal place of business at 1790 Broadway, New York, New York.

4. That defendant Richard "Dick" Sandhaus was and is the principal of all the defendant corporations and businesses.

AS AND FOR A FIRST CAUSE OF ACTION

5. Plaintiff repeats and realleges each and every allegation of the paragraphs of this complaint designated "1" through "4" with the same force and effect as if herein set forth anew.

6. That on or about January 1, 1978, the plaintiff, Stephen Weinreich, the defendant, Richard Sandhaus, and a third party, Michael Metz, formed a business the purpose of which was to design, develop and distribute Laser Light and derivative systems for commercial, entertainment, and other uses.

7. That subsequent to said date various laser light systems, techniques and technologies were developed and marketed through the joint efforts of all of the aforementioned parties, and that the plaintiff contributed substantial and significant time, effort and expertise, in good faith, to the endeavor.

8. That during the first part of 1978, the plaintiff, Stephen Weinreich, and the defendant Richard Sandhaus, agreed and contracted verbally and in writing, that the plaintiff was entitled to one-third (1/3) of all profits and assets of and belonging to and generated by said business for his contributions, and that neither

the plaintiff, Stephen Weinreich, nor the defendant, Richard Sandhaus, nor the aforementioned third party Michael Metz would each by himself separately own or control any more than a one-third (1/3) share of said business.

9. That on or about May 1, 1978, the defendant, Richard Sandhaus, acting on behalf of himself and the said business entered into and signed a written agreement specifying that said one-third (1/3) controlling interest and one-third (1/3) of the receipts and profits of said business belonged to and were due and owing to the plaintiff, Stephen Weinreich.

10. That Richard Sandhaus assumed responsibility for, among other things during the course of the operation of the business, handling the details of the marketing, sales, accounting, and distribution of the earnings and profits of the business, and the interest accrued thereon.

11. Subsequently, Richard Sandhaus formed a corporation known as "Science Faction" to perform, and which actually did perform, the same services as was performed by the aforesaid business and used the same assets, technology, information, hardware, and systems derived, developed and contributed by and from the plaintiff, Stephen Weinreich and of the aforesaid business, and used by the defendants.

12. Defendant Richard Sandhaus, both individually and in his corporate capacities has marketed, sold and rented the initial systems and technology derived by plaintiff, Stephen Weinreich, and the derivative systems which were generated thereby. Plaintiff has not received remuneration in proportion to the income that has been derived by defendants from the successful marketing and use of plaintiff's work product.

Appendix A

13. That to the present, plaintiff has not received any stock, assets, shares, interests, ownership, profits, or even any information concerning the above, pursuant to the aforesaid agreements, and which plaintiff is entitled as his full share of the above business from defendants, other than some nominal amounts.

AS AND FOR A SECOND CAUSE OF ACTION

14. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this complaint designated "1" through "13" with the same force and effect as if herein set forth anew.

15. Plaintiff has made demand of the defendants to account for their actions and to provide records and all other relevant information pertaining to the operation of the aforesaid businesses and to pay to the plaintiff his just and rightful share as per the aforementioned agreements, but defendants have absolutely refused to comply with these demands. An accounting of defendants' actions is therefore necessary and essential.

16. Plaintiff possesses no adequate or complete remedy at law for the injuries alleged herein. Plaintiff will be irreparably injured should equity not intervene.

AS AND FOR A THIRD CAUSE OF ACTION

17. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of this complaint designated "1" through "16" with the same force and effect as if herein set forth anew.

Appendix A

18. Defendants, and particularly defendant Richard Sandhaus, have commingled the assets, liabilities, income, expenses and properties of defendant Science Faction, defendant Sandhaus Productions (including plaintiff's share thereof) as well as those properties and liabilities individually and personally owned by defendant Richard Sandhaus.

19. That the aforesaid intermingling is fraudulent and a breach of fiduciary duty on the part of defendants.

20. That the defendants hold in constructive trust for the benefit of plaintiff, all assets of Science Faction and Sandhaus Productions acquired after the 1st day of January, 1978, *i.e.* the date of the aforesaid agreement among the parties, or generated by said assets or businesses from said date.

21. That defendants additionally hold all of the assets alleged in paragraph "19", wherever their present location may be or whatever the present form they can be traced to, after the aforesaid commingling of assets and properties.

22. Plaintiff possesses no adequate or complete remedy at law for the injuries alleged herein. Plaintiff will be irreparably injured should equity not intervene.

AS AND FOR A FOURTH CAUSE OF ACTION

23. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of the complaint designated "1" through "22" with the same force and effect as if herein set forth anew.

24. That Plaintiff is entitled to compensation and

remuneration for the valuable ideas and services rendered to the benefit of defendants, and to a share of the profits generated thereby, on the basis of *quantum meruit* and *quasi-contract.*

25. Plaintiff possesses no adequate or complete remedy at law for the injuries alleged herein. Plaintiff will be irreparably injured should equity not intervene.

AS AND FOR A FIFTH CAUSE OF ACTION

26. Plaintiff repeats and realleges each and every allegation contained in the paragraphs of the complaint designated "1" through "24" with the same force and effect as if herein set forth anew.

27. Defendants did fail to exercise ordinary care and did negligently maintain their records and fail to pay plaintiff or give notice to plaintiff relating to plaintiff's rightful one-third (1/3) share of Science Faction's assets and profits, all to the detriment and injury of plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants as follows:

1. That the defendants be required to account to the plaintiff Stephen Weinreich for all monies and property received, disbursed, held and assigned by defendants and for all defendants' actions and dealings in connection with said laser light business and

2. That the defendants be required to pay to the plaintiff FIVE MILLION ($5,000,000.00) DOLLARS, or such sum of money which this Court finds is due and owing as a result of the

operation of defendants' laser light business (both with the parties together and subsequently by the defendants alone), and

3. That the assets and properties acquired by defendants after January 1, 1978, the date of an agreement between the parties, be deemed in constructive trust for the benefit of plaintiff, and

4. That the defendants be required to pay plaintiff the sum of FIVE MILLION ($5,000,000.00) DOLLARS, or such amount as this Court deems reasonable, for the valuable services rendered by plaintiff, and the profits generated thereby, in *quantum meruit* and *quasi-contract*, and

5. That the defendants be enjoined from disposing of any of the assets acquired after January 1, 1978, *i.e.* the date of the agreement between the parties, until such time as this Court may decide the rights and obligations of the parties, and

6. That the defendants pay the costs, disbursements and attorneys' fees necessary to bring and maintain this action, and

7. For such other and further relief as to this Court may seem just, proper and equitable.

Dated: Garden City, New York
May 19, 1983

s/ William A. Sandback
WILLIAM A. SANDBACK
A Member of the Firm of
SANDBACK & BIRNBAUM
1205 Franklin Avenue
Garden City, New York 11530
(516) 741-3222

APPENDIX B — EXCERPTS OF DEPOSITION OF STEPHEN WEINREICH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 CIV 3966

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC., and SCIENCE FACTION SYSTEMS,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL METZ,

Plaintiff,

-against-

DICK SANDHAUS,

Defendant.

Appendix B

* * *

[311] become the 2000 series; they were then in turn used for the promotion and sale of other systems including, for example, the Kiss rodeo show, which I think is about as far as I can personally go in the chronology. But everything that the business did as a result of the sale and promotion of these systems is, of course, derivative.

Q Were you paid for any services rendered in connection with the Kiss rodeo show?

A No.

Q Are you making any claim in this lawsuit for services rendered in connection with the Kiss rodeo show?

A No.

Q You allege in paragraph 11 of the complaint that "subsequently Richard Sandhaus formed a corporation known as Science Faction to perform, and which actually did perform the same services as was performed by the aforesaid businesses and used the" — I hate to burden the record. When did you first become aware that a corporation called Science Faction Corporation was formed?

A I would say looking at Exhibit AT, that it was in summer, probably late summer of '78.

Q And then you say that Science Faction performed the same services as was performed by the aforesaid business. What services did Science Faction [312] Corporation perform after its organization?

Appendix B

A Science Faction Corporation was the embodiment of our business venture.

Q What services did it perform?

A Designed, manufactured, and sold, and rented laser entertainment systems and various other devices.

Q What facts do you have that Science Faction designed, manufactured, rented, and sold laser systems?

A For one, I did the major part of the design of the systems. For number two, I designed a trade show booth and was in attendance, I believe, at two shows, and it may have been used at for promoting Science Faction's sale of systems, and there were price lists published, and there were articles written in magazines, and papers filed in the B.R.H. for which I did some drawings regarding these systems.

And I had discussions and was in attendance with various of the employees of Science Faction and talked to them about the sale of systems, and as further systems were sold, Dick Sandhaus said, "We just sold one to France or this to wherever," and we had lists of how many systems and what types were sold, and I had arranged for the manufacture of parts for these systems, and I personal fabricated many of the systems. That's about as far as [313] I can go offhand without —

Q So that your prime testimony, where you said that you didn't have any facts by which you could support the allegation that Science Faction sold or rented the initial system and technology derived by the plaintiff, that was not correct?

A It was correct. You asked me whether I knew about the specifics of sales and who was paid and under what circumstances. I never saw money change hands and my information is as far as where these systems went, once they went out the door, is hearsay and a great deal of this information came from Dick Sandhaus, from his mouth, in which I said before, don't make these things facts.

Q But you did observe sales being made and systems being marketed by Science Faction Corporation?

A No, I don't believe I ever saw an actual sale in progress. I never saw money changing hands; I never saw anybody sign a contract for the sale of the system.

I saw systems manufactured and I saw them go out the door. I was never involved in the delivery of a system and so forth. I don't know, for example, if Xenon might have in fact been a rental, and I was never told the truth about it. But I saw it in operation at Xenon. So you are asking two different questions, and I have [314] answered each of them separately, and they are not conflicting answers.

Q Let me refer you to paragraph 18 of the complaint. Why don't you read that.

What facts do you know of to support the allegations contained in that paragraph of the complaint?

A For one, I saw a bill from a publicity company — I don't remember the name of the company right now, but they were people whom I had met at the office and who were doing publicity at Science Faction Corporation — and the bill was addressed to

Science Faction Corporation, and the subject of the bill was promotion of the Susan Berkley radio show, which was produced by Dick Sandhaus Productions.

As far as I know, it was the only business of Dick Sandhaus Productions at that time.

Q Do you have any other facts to support that allegation?

A The arrangement among Dick and myself and Mike Metz caused the Silver system to be built. And the Silver system was presumably built under the, or rather sold or rented through Dick Sandhaus Productions, as I was told by Dick, and yet somehow that system became part of a contract with Xenon for Science Faction to sell a system to Xenon, and so it somehow drifted across the [315] lines of the two corporations.

And, in fact, Dick really had no right to maintain Science Faction for himself, so that enters into it also.

Q You mentioned two things, a bill of Science Faction Corporation for a radio show, and you mentioned the rental of the Silver system by Science Faction Corporation to Xenon; is that correct?

A Right. Well, or sale or something. Rental of the Silver system in conjunction with the sale; I am not sure of the details.

Q Outside of that, what other facts do you have to support that allegation?

A There was also the office that Science Faction shared with Dick Sandhaus Productions and which, to the best of my

knowledge, was never devised in terms of what was used for either business.

Q You just testified that Science Faction Corporation rented or sold the Silver system to Xenon but —

A Rented, I believe.

Q Doesn't that directly contradict your earlier testimony where you said you had no facts as to whether Science Faction had rented or sold the Silver system to Xenon?

A No, as I just explained, that information came to me [316] by way of Dick Sandhaus; he told me that and I do not know that for a fact. I only know that from what Dick told me.

Q Is it your testimony that you had no other information as to sales or rentals of laser lighting equipment other than from what you learned from Dick Sandhaus?

A I believe that's correct.

Q But from Dick Sandhaus you did learn that Science Faction Corporation was renting or selling laser lighting equipment?

A Yes.

Q And, in fact, you did observe Science Faction Corporation marketing laser lighting equipment?

A Yes.

Appendix B

Q And you did, in fact, observe that Science Faction Corporation was delivering laser lighting equipment?

A Well, as I say, I knew it was being manufactured. I saw — we worked on systems being put together and, in fact, they were shipped out but I never saw anything delivered.

Q Did you ever see any invoices on Science Faction letterhead or billing head?

A I don't believe so.

[317] Q Did you ever see any invoices on Dick Sandhaus letterhead or billing head?

A I don't believe so.

Q Did you ever have any conversations with anyone where you learned that Dick Sandhaus was personally for himself selling laser lighting equipment or laser show equipment?

A As soon as Dick Sandhaus refused to distribute the stock in Science Faction Corporation, he was taking our interest.

Q That's not responsive. Did anyone ever tell you, did you learn from anyone, that Dick Sandhaus was acting other than as an officer of the corporation with regard to the sale or rental of any laser systems?

A No, I have no specific knowledge of that.

Q Other than the Silver system which you testified was manufactured by Dick Sandhaus Productions, Inc., and which

was later rented by Science Faction Corporation, are you aware of or do you have any facts of which you could support your allegation that the assets of Science Faction Corporation and Dick Sandhaus Productions, Inc., were comingled?

A I think I stated a couple of other reasons.

Q I said "assets."

[318] A The assets?

Q I said "assets." Just confine that to assets.

A There was a shared office, and I certainly, in viewing the operation of the office, saw no attempt nor actual separation of the uses of equipment or furniture or anything else between the corporations or, for that matter, for Dick Sandhaus personally.

Q Let's talk about, do you have any facts by which you can support the allegation that Dick Sandhaus Productions, Inc., commingled liabilities with Science Faction Corporation?

A That bill that I said before, and as far as the office is concerned, I repeat that.

Q Are there any other facts that you know of to support "joined" liabilities?

A I don't know that I can specifically tie the physical parts of the laser systems into that, but it appeared that they were, to use the word, joined.

Q What facts led you to believe that they were "joined"?

A As I just said, "I didn't like that word, but you used the word "commingled."

Q You did.

A And I just explained why I believe all those [319] assets and whatever were commingled.

Q So the two things that you can point to are the fact that the Silver system was manufactured by Dick Sandhaus Productions, Inc., but was ultimately rented to Xenon by Science Faction Corporation; that's one, right?

A Yes.

Q And the second thing is the fact that Dick Sandhaus Productions, Inc., and Science Faction Corporation appeared to share offices.

A That's two.

Q What other facts, then, do you have besides those two?

A The bill which I must say was one of the few bills that came into that office, that I ever saw, and it just happened to be billed to Science Faction for an expense of Dick Sandhaus Productions.

Q How are you aware that it was an expense of Dick Sandhaus Productions?

A Because it was for the Xenol, Berkley radio show which was the business of Dick Sandhaus Productions.

Q Other than that one bill, are you aware of any other facts?

A No.

Q So then the facts regarding the "commingling [320] of assets and liabilities" are restricted to the following three items: The rental of the Silver system by Science Faction Corporation, which was manufactured by Dick Sandhaus Productions, Inc.; the sharing of offices between Dick Sandhaus Productions, Inc., and Science Faction Corporation; and your observation of this bill; is that correct?

A Generally correct. You have somehow managed to have the Silver system manufactured by Dick Sandhaus Productions and I would say, and as I did say, it was sold through or rather — yes, sold through or rented through, or Dick Sandhaus Productions was somehow a vehicle involved in that procedure.

Q Do you have any facts by which you can support the allegation that Richard C. Sandhaus personally has commingled his properties and liabilities with Science Faction Corporation?

A Oh, for the — under the circumstances of his incorporation, he is the sole owner of Science Faction Corporation; the assets, his assets, were a third interest in what Science Faction is doing now, and he has taken all of it, and so Science Faction is intimately commingled with Dick Sandhaus and by the office arrangement with Dick Sandhaus Productions.

[321] Q Do you have any facts by which you can support the allegation that any liabilities of Dick Sandhaus personally have somehow been commingled with Science Faction Corporation and Dick Sandhaus Productions, Inc.?

A No.

Q Do you have any facts by which you can support the allegation that the income of Richard Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc., have been commingled?

A As I said, for the moment, Dick Sandhaus, as far as I know, owns all of Science Faction Corporation.

Q Answer the question. I said the income of Richard Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc.

A I don't have any facts, no.

Q Do you have any facts to support the allegation that the expenses of Dick Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc., have been commingled?

A I already stated that.

Q I would like you to answer that question.

A Please read it back.

(Question read)

APPENDIX C — EXCERPTS OF DEPOSITION OF RICHARD SANDHAUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 CIV 3966

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC., and SCIENCE FACTION SYSTEMS,

Defendants.

880 Third Avenue
New York, New York

September 5, 1994
10:15 A.M.

Continued DEPOSITION of Defendant RICHARD SANDHAUS, taken by Plaintiff, pursuant to Agreement.

* * *

[98] compliance with whatever the new regulations are.

This Exhibit 4 refers to specific wording on a warning logo.

Appendix C

It's like a label that appears on a product, and it would certainly be true that as of this date, and this letter is from July of '81, that we would have been required to tell the BRH, to file the supplemental information to them, to the effect that any previously manufactured products were now in compliance with this new regulation.

So, it would certainly make sense that we would have made a filing that would cover both the 1003 and the 2000 series, because those are all products that would have had to — if they were to be used — would have to carry this new wording on the label.

MR. KLEINBAUM: Both are products manufactured prior to the date of that letter.

Q. What had happened to the 1003 series at that point in time?

A. Just sat on the shelf.

Q. It wasn't sold?

A. No.

Q. Now, I believe your testimony has been that Dick Sandhaus Productions, Inc. and Science Faction Corporation were two separate corporations.

A. That's true.

[99] Q. They never had a relationship to each other when Science Faction Corporationcame into existence?

Appendix C

A. What do you mean by "relationship"?

Q. Other than renting space, as you have previously said, and perhaps being physically housed in the same building, there was no relationship in regard to the products being manufactured or the marketing of any particular products? There was no enterprise between the two of them?

What you are trying to say is that they did different things?

A. That's correct.

Q. Would it be fair to say that Science Faction Corporation was never held out to be a subidiary of Dick Sandhaus Productions, Inc.?

A. True.

What do you mean by "held out"? Represented to be?

Q. Represented to the public as being a subsidiary in any way connected with Dick Sandhaus Productions, Inc.

A. To my recollection, it was never represented to be a subsidiary of the other.

MR. SANDBACK: Could we have this marked as [100] an exhibit.

(A brochure was marked as Plaintiff's Exhibit 5 for identification.)

Q. Would you take a look at that. Do you recognize that?

A. Yes.

Q. What is it?

A. It's a piece of sales literature that describes the 2000, the SFC 2000 series system, and it has photographs of visual displays that are created by them.

Q. Was that prepared by Science Faction Corporation?

A. Yes.

Q. Do you remember when it was prepared?

A. Yes. It would have been in 1979 sometime, I think. Yes, it would have been early '79.

Q. If you look on the last page, the writing that appears in the small print at the very foot of the page, could you tell me what that says there?

A. Yes, it says "Science Faction Corporation is an affiliate of Dick Sandhaus Productions, Inc."

Q. Did you approve that writing to appear on that particular document?

A. Yes. I probably wrote it.

[101] Q. Could you tell me how you define affiliate, the word affiliate?

A. Just as some kind of association, affiliation, association .

Appendix C

Q. In the year 1979, did you prepare other types of promotional materials for your 2000 series?

A. Probably, although I can't specifically recall what it would have been right now.

Q. Do you have a recollection as to whether or not you again held out Science Faction Corporation to be an affiliate of Dick Sandhaus Productions, Inc.?

MR. KLEINBAUM: When you say "held out," you said that — or the material contained a statement that it was an affiliate of Dick Sandhaus Productions, Inc.

MR. SANDBACK: Correct. I will rephrase the question to say that.

A. I really don't recall without seeing the stuff. It's a long time ago.

Q. From 1979 to the present, have you ever made representations to anyone, either in any of the promotional material or verbally, that Science Faction Corporation was either an affiliate or subsidiary of Dick Sandhaus Productions?

[102] MR. KLEINBAUM: Separate the question so that there is no confusion.

MR. SANDBACK: I don't think there is confusion in the question. I never at any time before or after '79 represented that Science Faction or Dick Sandhaus Productions, Inc. was an affiliate — a subsidiary of the other.

Q. You are not sure if they were an affiliate?

Q. Clearly, here, I have said it, and I have at various times done things to help refer public relations, sales and marketing for purposes of helping associate my personal name with Science Faction Corporation, and I did that as a particular intentional effort in the early days of Science Faction Corporation, because my name personally was fairly well known to various people in the entertainment business that could utilize our services.

Q. Your personal name does not appear as an affiliate there. It is a corporate name.

A. It's the corporate name, but the corporate name happens to be my personal name or happens to include my personal name, and it just seems less ostentatious to say it's an affiliate of a corporation than to say that Dick Sandhaus is the president of Science Faction Corporation. [111] leasing it or an outright sale?

A. I have never referred to it as a lease. It's a full service rental.

Q. Can you categorize it as a rental?

A. Yes.

Q. Now, the arrangements that you have discussed before concerning Science Faction Corporation and Dick Sandhaus Productions, Inc., besides Science Faction Corporation apparently leasing space from Dick Sandhaus Productions, Inc., was there any other arrangement in regard to the sharing of personnel or the sharing of certain physical equipment, etc.?

MR. KLEINBAUM: I am going to object to that question in terms that it is not related in time and it deals — it proceeds on a premise that there is a rental of space by Science Faction from Dick Sandhaus Productions.

MR. SANBACK: I think that's what the testimony has been this morning.

MR. KLEINAUM: I am not sure that that is entirely true. I don't think that has been the testimony. I don't think that was the testimony this morning. Maybe I am mischaracterizing it.

A. I testified that Dick Sandhaus's office space, [112] which was also used by Science Faction and for which Science Faction paid —

MR. KLEINBAUM: All right.

A. There was also joint use by the two corporations of, you know, telephone systems, Xerox machines, of like, general office equipment, and that was stuff jointly paid for.

Q. How about personnel?

A. It would only have been in the case of secretarial.

Q. Were any invoices ever sent to customers of Science Faction Corporation by Dick Sandhaus Corporation, Inc.? That answer requires either a yes or a no.

A. It seems by definition that the answer is no.

Q. Is it no?

Appendix C

A. Science Faction invoices its customers, and Dick Sandhaus invoices its customers.

MR. KLEINBAUM: Let me explain what he is driving at. He's saying if there are transactions between those two companies as a result of which Science Faction may or may not have paid some expenses or Dick Sandhaus paid some expenses of Science Faction, were those charges ever reflected by corresponding invoices from one corporation?

[113] THE WITNESS: You are asking if Science Faction and Dick Sandhaus sent invoices to other parties?

MR. SANDBACK: I think I should clear the question up.

Q. Did Dick Sandhaus Productions, Inc., to your knowledge, ever bill anyone on behalf of Science Faction Corporation?

MR. KLEINBAUM: I misunderstood the question.

A. Not to my recollection.

Q. Were there any accounts receivable attributable to Science Faction Corporation made payable to Dick Sandhaus Productions, Inc.?

A. Not that I can presently recall. It's possible that that could have happened.

Q. Under what circumstances could it have happened.

A. I can't imagine.

MR. KLEINBAUM: He said it's possible but he doesn't recall.

Q. It's possible that Dick Sandhaus Productions dealt with some customer, party, at some time and that subsequently Science Faction dealt with that same customer, party, and that by mistake the customer, party, would have paid the wrong company. But, I mean, I don't recall any [114] incident of that. But that's a long time ago.

Q. Did Science Faction Corporation ever hire Dick Sandhaus Productions, Inc. to ever do any marketing or customer relationships for it?

A. Not that I can specifically recall.

Q. I am sorry. Do you want to continue?

A. No. I will just leave it at that.

Q. Did Science Faction Corporation ever have its corporate offices at any other location other than where Dick Sandhaus Productions, Inc. had its corporate offices?

A. Yes.

Q. Where was that and when was that?

A. Science Faction took office space at 333 West 52nd Street sometime in 1979. That space was used solely by Science Faction Corporation.

Q. Was it used for a particular purpose?

A. The space?

Q. Yes, to your knowledge.

A. For the business of Science Faction Corporation

Q. In other words, as far as you knew, their entire business was transacted out of this particular location?

A. No. Well, that became the case. When the space on 52nd Street was first taken, it was used only for [115] manufacturing and testing and as a demonstration facility, not for administrative purposes, although subsequently it came to be used for all purposes.

Q. Did Dick Sandhaus Productions, Inc. remain at 445 Park Avenue?

A. Yes.

MR. KLEINBAUM: Until when?

MR. SANDBACK: We are talking about the time period of '78, '79.

MR. KLEINBAUM: Okay.

Q. Subsequent to '78, '79, did Science Faction Corporation ever merge its space with Dick Sandhaus Productions, Inc. again?

A. No, not to my recollection.

Appendix C

Q. To your knowledge, did Dick Sandhaus Productions, Inc. ever pay any expenses for Science Faction Corporation or vice-versa?

A. I am not sure if the technically correct answer is yes or no. I will tell you what kinds of things that did happen.

Q. Okay.

A. Sometime probably in late '79 or early '80, Dick Sandhaus Productions became dormant, didn't conduct any activities. Yes, there were things, leases in the name [116] of Sandhaus Productions, which were paid directly by Science Faction Corporation that would have been leased for office space, by lease payments on Xerox machines, that sort of thing, that were after a certain date utilized only by Science Faction Corporation, and they were paid for directly by Science Faction Corporation. Is that the kind of thing you are asking me about?

Q. It may or may not be. Let's take the Xerox machine as an example.

A. Right.

Q. Was this a lease where you would be able to buy the machine at the end of the lease?

A. It was actually a purchase from the beginning, and you simply paid it over a period of five years or something.

Q. And did that asset get passed over?

A. Originally all the paper work would have been in the

name of Dick Sandhaus Productions, but it was in Science Faction.

Q. Was there a provision under your lease, holding it as Dick Sandhaus Productions, Inc., to sublet it to a corporation such as Science Faction Corporation?

A. Well, it wasn't really sublet. It was sold.

Q. Dick Sandhaus Productions, Inc. assigned their [117] right, title and lease to Science Faction?

A. Yes.

Q. So, there was a transfer on the books?

A. Right.

MR. SANDBACK: Could we have this marked as an exhibit.

(An 1120 tax form was marked as Plaintiff's Exhibit 6 for identification.)

Q. Let me show you this exhibit, which is marked as Plaintiff's Exhibit 6.

MR. KLEINBAUM: That is a U.S. form, 1120, for 1978.

Q. Do you recognize that?

A. Yes.

Appendix C

Q. You assisted your attorney in providing it to us pursuant to discovery requests.

MR. KLEINBAUM: He didn't assist. He gave it to me and I gave it to you. I assisted him.

Q. Would you take a look at the third page, which should read, "Section 1561, Apportionment."

A. Yes.

Q. Can you state on the record how this apportionment took place between Dick Sandhaus Productions, Inc. and Science Faction Corporation?

[118] MR. KLEINBAUM: If you know.

Q. If you know, of course.

A. No. I really don't know.

Q. Could you consult with your accountant or some other financial officer to determine how that apportionment took place, and we will leave a space in the record for your answer?

A. Yes. I don't even know what it is.

(INSERT): _____

_____

_____

Q. On the same exhibit, Exhibit 6, would you turn to page 7, which should be line 26, other deductions.

A. Yes.

Q. Under the line which indicates provisional and consulting fees, there is a figure there of $62,667.

A. Yes.

Q. Can you tell us who was retained by Science Faction Corporation during the time period in question as either a professional or on a consulting basis?

MR. KLEINBAUM: Let me ask you a question. What is the relevancy here What are you trying to get at?

MR. SANDBACK: The relevancy is that I want to. . . .

* * *

APPENDIX D — EXCERPTS OF TRIAL TRANSCRIPT DATED JANUARY 12, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

January 12, 1994
10:00 a.m.

STEPHEN WEINREICH,

Plaintiff,

v.

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

DANIEL MARTIN
Attorney for plaintiff

GERALD M. KLEINBAUM
Attorney for defendants

Appendix D

* * *

[818] believe, are listed as officers. But I am not sure of the answer with respect to directors. You would know that better than I.

Q. Where there any other? You mentioned, just going back for a minute in time, the first time that you met Steve Weinreich and what he told you about his engineering background.

Were there any other occasions in which he told you —

MR. MARTIN: Objection, your Honor.

Q. — about his engineering background?

THE COURT: Overruled.

A. I recall that when we were in Harrisburg, Pennsylvania, for this BRH, state radiation control directors conference, that in front of me he introduced himself to others there as a mechanical design engineer.

Similarly, I heard him introduce himself to others in that way at other times but that I don't recall specifically.

Q. Did there ever come a time when the title to the Silver System was transferred from DSPI to SFC?

A. Yes, there was.

THE COURT: What was the form of that transaction?

THE WITNESS: As I understand it —

[819] THE COURT: No, never mind that. Just what happened?

THE WITNESS: The accountant set up what I think was called an exchange account between SFC and DSPI. The Silver System was given some value and then assigned to SFC.

In exchange for that, there were things that SFC paid for, for example, rent and other office equipment rentals and things like that that were exchanged that SFC paid for on behalf of DSPI. That is my best understanding of that.

THE COURT: No papers?

THE WITNESS: Only some entry in a tax filing. But, no, I did not have an agreement prepared between the two corporations.

Q. Was there ever a time when you — when I say "you," I am speaking about you now as an officer, as a representative of SFC — or SFC went to a trade show in the summer of 1978?

A. Yes. We were an exhibitor at, I don't recall the name of the show, but it was a trade show that was directed at and attended by owners and operators of nightclubs and discoteques. I believe it was at the very end of June of 1978. I am not certain if I was there on behalf of DSPI or SFC at that time. SFC was incorporated in June of 1978. That's my answer.

* * *

APPENDIX E — EXCERPTS OF TRIAL TRANSCRIPT DATED JANUARY 14, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

January 14, 1994
9:50 a.m.

STEPHEN WEINREICH,

Plaintiff,

v.

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

DANIEL MARTIN
Attorney for plaintiff

GERALD M. KLEINBAUM
Attorney for defendants

Appendix E

Sandhaus - redirect

* * *

[1147] of complying with the standard, with the performance standard, that I regarded as being so different from any other laser light show projectors that I felt it was appropriate to file an initial report.

Q. Why wasn't an initial report filed for the Laserchaser II later in 1986?

A. That's because, in the course of this litigation, plaintiffs have made extensive efforts to confuse the Court about what different technologies were being referred to for regulatory designation purposes as 2000, and so we decided at that point to start calling something something else.

Q. Since its organization and through the period that it was actively engaged in business, did DSPI maintain its own bank accounts?

A. Yes.

Q. And did it maintain its own records of receipts and disbursements and general ledgers?

A. Yes.

Q. Did it file tax returns in its name?

A. Yes.

Q. Is it continuing to do so today?

A. Yes. Well, it is continuing to file tax returns in its own name.

Q. Do you recall whether there are any officers or directors of DSPI other than yourself?

[1148] A. I believe, though I am not certain, that my father and/or sister are officers.

Q. With respect to Science Faction Corporation, since its organization has it maintained its own bank accounts?

A. Yes.

Q. And since its organization, has it maintained its own financial records, including ledgers?

A. Yes.

Q. Has it filed its tax returns in its own name?

A. Yes.

Q. Do you know whether or not there are any officers and directors of Science Faction Corporation other than yourself?

A. Again, I am not certain, but it is possible that either my sister and/or father are officers.

Q. When it was first incorporated, do you recall that that was the case?

Appendix E

A. I believe that when it was first incorporated, my father and an attorney named John Dasher appeared as officers.

Q. Earlier this morning you were questioned about a February 1978 memorandum between DSPI and Mr. Bud Praeger of ESP with respect to Foreigner. Could you explain what that memorandum was?

* * *

APPENDIX F — TRIAL EXHIBIT 20

(Omitted here but submitted separately as Lodging Appendix)

APPENDIX G — TRIAL EXHIBIT 31

DICK SANDHAUS PRODUCTIONS, INC.
445 PARK AVENUE
NEW YORK, NEW YORK 10022
(212) 688-7786

August 23, 1978

Hearing Clerk
Food and Drug Administration
Room 4-65
5600 Fishers Lane
Rockville, Maryland

Dear Sir:

Pursuant to 1010.4 of the Regulations for the Administration and Enforcement of the Radiation Control for Health and Safety Act of 1968, Science Faction Corporation (hereinafter referred to as "manufacturer") hereby requests a variance for its demonstration laser system, SFC-1003.

The following will describe the product and the means by which equivalent protection is provided.

1. The product is a demonstration laser system that is intended to display visual images (abstract, representative and/or textual) for artistic, entertainment, education and/or advertising purposes. Images may be displayed for public viewing in public venues (theatres, auditoriums, arenas, discotheques, nightclubs, stadiums, parks, etc.) and/or in restricted "studio" venues for still photography; motion photography and/or videotaping. The product achieves its intended functions by *scanning* patterns on projection

Appendix G

screens, walls, ceilings, floors and other screen-like surfaces. The *scanned* patterns and/or the *scanning* beams (as they may be visual in airborn scattering media) provide aesthetically appealing visual representations which may constitute art, entertainment or information display for the purpose of advertising, education, etc.

2. The product incorporates a CW laser. If the output of such laser were restricted to Class I, or even to Class II, the *scanned* CW laser radiation would be invisible or nearly invisible when *scanned* over areas in excess of one hundred square feet. Typically, the product is used to scan over areas in excess of two hundred and fifty square feet.

3. We propose to deviate from the requirements of the standard for demonstration laser products by incorporating in our product a certified Class IV CW laser.

4. Such incorporation will allow the product to scan effectively visible patterns in excess of two hundred and fifty square feet. This is a necessary function of the product.

5. Equivalent protection is provided by *scanning*, and displaying visual images according to parameters (radiant power output, whole angle divergence of beam, scan frequency, scan amplitude, distance from laser to viewer or diffuse target, beam diameter at distance) set forth in "tabulated values and limits for product's accessible emissions", which is included in the product report submitted by BRH Division of Compliance. To verbally summarize these values and limits: product is used in such manner as to ensure that all accessible emissions are within the Class I limit. Because the *scanning* of the product's CW

laser radiation is of primary importance to ensuring this equivalent protection, a "no-scan safeguard" is incorporated in the product. Scan safeguard is accomplished by reading voltage across a resistor wired in series with product's galvanometer scanners to sense scanners' *outputs*. If scanners do not receive proper control signal and/or malfunction (e.g. damaged coil), voltage outside normal range will be sensed across resistor and cause a physical shutter (1/8" black aluminum) to be activated to prevent emission of unscanned radiation from product.

6. It is requested that the variance be granted with no limit to its time duration. Manufacturer anticipates production of not more than ten such products.

7. The fully-operational prototype product is mobile and will be used in multiple locations. Product will be stored at manufacturer's address.

8. Additional, more detailed information has been reported, per 1002.10, to Director, BRH.

Please direct all correspondence to: Mr. Dick Sandhaus, President; Science Faction Corporation; c/o Dick Sandhaus Productions, Inc.; 445 Park Avenue; New York, New York 10022.

Sincerely,

DICK SANDHAUS

DS:ess

APPENDIX H — FEBRUARY 11, 1994 LETTER FROM GERALD KLEINBAUM TO JUDGE SWEET WITH HANDWRITTEN NOTE

GERALD M. KLEINBAUM
ATTORNEY-AT-LAW
90 PARK AVENUE
NEW YORK, NEW YORK 10016-1387
(212) 245-6400

February 11, 1994

FACSIMILE
791-8558

Honorable Robert W. Sweet
United States District Court Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Weinreich v. Sandhaus, et al
83 Civ. 3966 (CES)

Dear Judge Sweet:

I herewith request an extension (a) to submit Defendants' proposed findings of fact and conclusions of law and memorandum of law which are due today to Monday, February 14, 1994, and (b) an extension of the time for argument to Tuesday or Wednesday, February 15 or 16, 1994, at the Court's convenience. The Wednesday date will be less convenient for Mr. Martin, but he would be able to attend.

The request is made because as a result of the snow

Appendix H

emergency the office will close at 1:00 p.m. today and because of staffing problems I will be unable to serve and file my papers before the end of the day.

I have discussed the proposed extension with Mr. Martin who has no objection thereto.

Respectfully yours,

s/ Gerald M. Kleinbaum
GERALD M. KLEINBAUM

GMK/vdb

cc: Daniel Martin, Esq.

[Handwritten on bottom of letter]:

Dear Dan, This will confirm our conversation that I will not read your papers until I have served defendants' papers. Judge Sweet extended d's time to serve and file until Monday & scheduled [remainder of copy is illegible].

APPENDIX I — EXCERPTED DEFENDANTS' POST TRIAL MEMORANDUM OF LAW WITH PROOF OF SERVICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

DEFENDANTS' POST-TRIAL MEMORANDUM OF LAW

Preliminary Statement

Defendants, Richard C. Sandhaus also known as Dick Sandhaus ("Sandhaus"), Dick Sandhaus Productions, Inc. ("DSPI"), and Science Faction Corporation ("SFC"), respectfully submit this Post-Trial Memorandum of Law upon the conclusion of the trial of this action held before the Judge January 5-7, 1994, January 10-14, 1994, and January 17-18, 1994.

The trial of this action concerned two claims by plaintiff and counterclaims by defendants. Plaintiff's first claim is for breach

of contract based on a letter written by plaintiff dated April 18, 1978, which was signed by DSPI on or about May 1, 1978 (the "Letter", Exhibit 1)), and provides, among other things, that in consideration of plaintiff's design work on a laser light show then currently in production, plaintiff would be entitled to a one-third

* * *

POINT IX.

THERE IS NO EVIDENCE WARRANTING THIS COURT TO DISREGARD THE CORPORATE ENTITIES OF DSPI AND SFC TO IMPOSE ANY PERSONAL LIABILITY UPON SANDHAUS

There is no evidence that Sandhaus comingled his personal affairs with either the business affairs of either DSPI or SFC. Therefore, there is no basis to disregard the corporate entities of DSPI or SFC to impose any personal. . . .

Moreover, there is no evidence that the business affairs of DSPI or SFC were comingled, warranting the Court to disregard the separate corporate identities of those corporations. Each corporation maintained its own bank accounts, check books, ledgers and filed separate and independent tax returns.

There is no evidence that Sandhaus personally ever sold or rented any laser light show system.

* * *

Appendix I

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

I, Gerald M. Kleinbaum, being sworn, say: I am not a party to the action, am over 18 years of age and maintain my offices at 90 Park Avenue, New York, NY 10016-1387.

On February 14, 1994, I served the within Defendants' Proposed Findings of Fact and Conclusions of Law, and Post-Trial Memorandum of Law, by facsimile transmission sent to:

Daniel Martin, Esq.
(609) 771-9342,

and by Express Mail by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to:

Daniel Martin, Esq.
816 Silvia Street, Suite 800 B
Trenton, NJ 08628-3240

s/ Gerald M. Kleinbaum
GERALD M. KLEINBAUM

Sworn to before me this
14th day of February, 1994

s/ Robert C. Holstein
Notary Public

APPENDIX J — EXCERPTED DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants, Richard C. Sandhaus also known as Dick Sandhaus ("Sandhaus"), Dick Sandhaus Productions, Inc. ("DSPI"), and Science Faction Corporation ("SFC"), respectfully submit their proposed Findings of Fact and Conclusions of Law upon the conclusion of the trial of this action held January 5-7, 1994, January 10-14, 1994, and January 17-18, 1994.

As these proposed Findings of Fact and Conclusions of Law are being submitted in advance of receipt of plaintiff's proposed Findings and Conclusions and Post-Trial Brief, defendants

request leave to amend or supplement this submission if plaintiff's proposed Findings and Conclusions or Brief discloses the existence of factual or legal issues which are not addressed below.

* * *

208. There is no basis on which the Court may disregard the separate corporate entities of SFC and DSPI. Each corporation maintained its own records, its own bank accounts, filed its own tax returns, and maintained separate records and books of account.

209. The Letter is merely a letter of intent and not a binding agreement. The intention of the parties should be determined by the language of the document where the language is clear. The first paragraph of the Letter says it is to "confirm our intention . . .", and the third paragraph says, "This letter is not intended to be a complete agreement . . .". It is clear that the parties did not intend the Letter to be an agreement. The "complete agreement" contemplated by Weinreich concerned many material elements not embodied in the Letter. It is undisputed that a "complete agreement" was never reached between the parties and that a "complete agreement" was never executed.

210. In addition, there was no agreement between Weinreich and DSPI as to the definition of "net profits" in the letter prior to the time the Letter was signed, at the time the Letter was signed, or thereafter. Agreement as to the meaning of "net profits" was essential to the formation of a binding contract since it was part of the formula on which Weinreich's compensation for his design service was to be based. The computation of "net

profits" in the Letter was left to future agreement between Weinreich and DSPI since

* * *

APPENDIX K — MAY 1, 1978 AGREEMENT

STEPHEN WEINREICH
5101 GORNIAK DRIVE
PARLIN, NJ 08859
(201) 727-7466

April 18, 1978

Dick Sandhaus
Dick Sandhaus Productions
1790 Broadway
New York, New York 10019

Dear Dick:

This will confirm our intention that all design work done by Stephen Weinreich for the laser light show currently in production is for the consideration of a 33 1/3% interest in the net profit earned by sale or rental of this or similar or derivative systems at prices and conditions mutually agreeable to Sandhaus and Weinreich, such agreement not to be unreasonably withheld.

Any funds drawn by Stephen Weinreich and charged against this project (other than expense reimbursements) will be considered as drawings on profits.

This letter is not intended to be a complete agreement, but is to express the general intent of both parties and is to govern in this matter until such an agreement is executed.

Your signature below indicates your agreement with these terms.

Yours truly,

s/ Stephen Weinreich
Stephen Weinreich

ACCEPTED by illegible
date 5/1/78

APPENDIX L — EXCERPTED JOINT PRE-TRIAL ORDER

10/27/93

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

JOINT
PRE-TRIAL ORDER

Plaintiff Stephen Weinreich (hereafter, "plaintiff" or "Weinreich") and defendants Richard Sandhaus, also known as Dick Sandhaus ("Sandhaus"), Science Faction Corporation ("SFC") and Dick Sandhaus Productions, Inc. ("DSPI") submit this Pre-Trial Order in accordance with the rules of this Court and the instructions of the Honorable Naomi Reice Buchwald, United States Magistrate Judge, including the instructions in her letters of September 14, 1993, and October 15, 1993.

1. *Jurisdiction* — This Court has jurisdiction over this

matter pursuant to 28 U.S.C. 1331 because plaintiff Stephen Weinreich ("Weinreich" or "plaintiff") is a citizen of New Jersey and the defendants are citizens of New York, and the amount in controversy, exclusive of interest and costs, exceeds the jurisdictional amount.

2. This is a non-jury case.

* * *

4. *Plaintiff's Claims* — There are two causes of action remaining in plaintiff's complaint. The first is plaintiff's claim for breach of an alleged agreement under which plaintiff was to receive one-third of the profits from the sale or rental of certain laser light show systems. Defendants understand this alleged agreement to be set forth in the document annexed as Exhibit A. The second claim in the action is a quantum meruit claim for damages for the reasonable value of services rendered by plaintiff to defendants. Plaintiff demands judgment against defendants on each of the two causes of action, in the amount of $5 million, with interest, costs and disbursements, and attorneys' fees.

5. *Defendants' Claims for Relief*

Defendants' Answer alleges eight offsets and counterclaims against plaintiff, as follows:

A. The first, second, and fourth counterclaims by DSPI allege in substance that plaintiff falsely and fraudulently represented to defendants Sandhaus and DSPI that he was a design engineer with a degree in engineering, and that he had the requisite skill and competence to work on the design and laser lighting systems; that defendants Sandhaus and DSPI relied on

these false and fraudulent representations and were induced to (a) engage plaintiff to perform design work on the Foreigner system and other laser lighting and special effects systems; (b) sign the document annexed as Exhibit A; (c) that plaintiff's work was incompetent and

* * *

6. *Uncontested Facts* — The parties stipulate that the following facts are not in dispute in this action, each party reserving the right to object to the materiality or relevancy of any such stipulated fact.

(1) Richard C. Sandhaus, sued herein as Richard Sandhaus, also known as Dick Sandhaus, is now, and has been at all times mentioned in the complaint, a resident of the City, County and State of New York.

(2) The defendant SFC is, and was at all times mentioned in the complaint, a New York corporation organized on June 7, 1978.

(3) At all times since SFC's incorporation, Sandhaus has been the president and sole shareholder of SFC.

(4) At all times since DSPI's incorporation, Sandhaus has been the president and sole shareholder of DSPI.

(5) At all times since its incorporation, SFC has been engaged in the business of designing, selling, and renting laser systems and services for display and entertainment purposes and producing laser shows.

Appendix L

(6) Plaintiff is and was at all times mentioned in the complaint a citizen of the State of New Jersey. He currently resides at 14 Norton Road, Monmouth Junction, New Jersey. In 1977, 1978, and 1979, plaintiff resided at 5101 Gorniak Drive, Parlin, New Jersey 08859.

(7) Plaintiff is not a college graduate. He has

* * *

(4) The document annexed as Exhibit A was signed by Sandhaus in his capacity as President of DSPI.

(5) The document annexed as Exhibit A was signed by defendant Sandhaus personally.

(6) Immediately prior to signing the document annexed as Exhibit A Sandhaus asked Weinreich what Weinreich meant by the word "similar" or "derivative" in the documents and Weinreich responded that he meant "the same system except that maybe the color is blue."

(7) After defendant SFC was formed in 1978, defendant Sandhaus transferred the Silver System as an asset from defendant DSPI to defendant SFC without consideration.

(8) Since its inception not all of the business of SFC has involved lasers.

(9) In 1978-1979, SFC offered for sale or rent other products and services, besides the sale or rental of the Silver or 2000 Series Systems.

Appendix L

(10) In or about October, 1988, Sandhaus provided a complete list of all of the products or projects of SFC to the court appointed expert.

(11) Methods of scanning other than by the use of galvanometer scanners were common in laser light systems in 1978.

(12) The scanning method chosen is a significant design characteristic of a laser light show system.

* * *

APPENDIX M — EXCERPTS OF CLOSING ARGUMENTS AND BRIEFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 3966 (CES)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS A/K/A DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

CLOSING ARGUMENTS AND BRIEFS

Plaintiff, Stephen Weinreich, by his attorney Daniel Martin, hereby submits these closing arguments and briefs in the above entitled action.

I. *Plaintiff's Contentions of Fact*

A. *Liability of Defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation (SFC) and Dick Sandhaus Productions, Inc. (DSPI) for breach of contract*

(1) *Exhibit 1 is a valid enforceable agreement*

Exhibit 1 was signed by plaintiff Stephen Weinreich on April 18, 1978, and by defendant Dick Sandhaus on May 1, 1978.

Appendix M

Defendants made four arguments against the enforceability of the agreement at trial. None of these arguments have any merit:

Defendant Sandhaus claimed that plaintiff induced him to enter into the agreement by falsely claiming to be an engineer (Trial Transcript (TT) at pages 811-812). This claim method of figuring net profits was not difficult to arrive at in this case, is confirmed by defendants' own Affidavit in support of motion for summary judgment (EX 1045) and trial testimony (TT 1103).

(2) *Defendant Sandhaus personally and the corporate defendants DSPI, and SFC, are all jointly and severally liable under Exhibit 1.*

Defendant Sandhaus testified at trial that he signed Exhibit 1 as president of DSPI. Presumably defendants will attempt to convince the Court that only DSPI, a dormant corporation, is therefore liable under the agreement. Overwhelming factual evidence, and clear legal precedent, belie this claim.

First of all, Exhibit 1 was signed by defendant personally. The letter was addressed to Dick Sandhaus, *at* Dick Sandhaus Productions, but there is no reference under Mr. Sandhaus' signature to his position as president of DSPI.

Moreover, the documentary evidence, supported by defendant Sandhaus' own trial testimony, makes it abundantly clear that DSPI and SFC were treated by defendant Sandhaus as his own "alter egos" with no personalities of their own. Judgment against all, jointly and severally, is therefore mandated under New York law (*Oriental Commercial and Shipping Co. Ltd v. Rossell,* 609 F. Supp 75, 78 (SDNY 1985) (See legal arguments infra for further discussion of this issue). "Alter ego" evidence includes the following":

Appendix M

(a) Defendant Sandhaus testified that he transferred title to the Silver System, upon which the agreement was based, from DSPI to SFC with no papers to support the transfer (TT 818-819).

(b) He further testified that the transfer was made because he was the sole shareholder of both corporations and wanted to transfer the laser portion of DSPI's business to a new corporation (Exh 1029, Sandhaus deposition, 1/14/86 at Page 68).

(c) After taking title to the Silver System, SFC rented it to Xenon (and elsewhere) in its own name (TT 1122). SFC's responsibility to satisfy all obligations of the Silver System (including the agreement to pay plaintiff 1/3 of the net profits from the Silver and similar or derivative systems, under Exhibit 1), is thus clear.

Yet defendant testified that SFC in no way agreed to assume any responsibilities under Exhibit 1 (Exhibit 1028, Sandhaus deposition at 9/5/84, page 57-58).

(d) SFC's 1978 tax return referred to DSPI and SFC as ". . . component members of a controlled group . . ." and later tax returns (Ex 462-464, 1050) apportioned taxable income between the two corporations;

(e) SFC's 1979 advertising literature (Ex 20) referred to itself as, ". . . an affiliate of DSPI . . .", though defendant Sandhaus testified (Supra) that the Silver System was transferred from DSPI to SFC in order to remove DSPI from the laser light show business. Obviously the continuing "affiliation" was solely based upon Mr. Sandhaus' total control over both corporations.

Appendix M

(f) A letter sent by Mr. Sandhaus to the BRH on August 23, 1978 requesting a variance for the Silver System for *SFC* was sent on *DSPI stationary* (Ex 1044).

(g) Finally, defendant Sandhaus specifically referred to DSPI and SFC as his alter egos on a number of occasions in his trial testimony:

1. In referring to DSPI's rental of office space, Mr. Sandhaus stated: "I was the subtenant and ESP was the prime tenant of the space." (TT 791)

2. At TT 908, Mr. Sandhaus again referred to himself as the corporation, (in this case SFC):

"So I marketed myself to him by direct mail and on the telephone";

3. And at TT 1149, Mr. Sandhaus said, ". . . I am DSP, Dick Sandhaus Productions, Inc."

(3) *All 2000 Series Systems, including various versions of electronic controls, and custom specials including the Hollywood Palace and the Empire State Building Systems are similar or derivative of the Silver System under Exhibit 1.*

As discussed at length below, Brian O'Brien, though appointed by the Court as an independent expert, exhibited bias in favor of defendants from the very beginning of his involve-

* * *

voluntarily severed his business ties with defendants in September, 1979, defendants continued to request his services in connection with all of their projects.

(2) ***Defendant Sandhaus personally, and the corporate defendants, DSPI and SFC, are all jointly and severally liable to pay plaintiff for his services in quantum meruit***

As discussed in part (2) above, defendant Sandhaus treated DSPI and SFC as his alter egos, routinely shifting assets and business between the companies, based upon his total control of both companies. Under New York law, all defendants are therefore liable to pay plaintiff in quantum meruit for his services.

* * *

same period of time, which contain different entries (Ex 11, pages D4, D5).

(3) Mr. Sandhaus falsely claimed in a pre-trial Affidavit (Ex 7) that he prepared *all* the ledgers; at trial he admitted that he prepared only *some* of them (TT947-949).

B. ***Defendant Richard Sandhaus treated the corporate defendants SFC and DSPI as his alter egos, exercising total control of their operations, and transferring assets freely between them. All defendants are therefore jointly and severally liable to plaintiff in quantum meruit and under Exhibit 1***

As discussed above, defendant Sandhaus exercised total control over SFC and DSPI. He transferred title to the Silver

Appendix M

System from DSPI to SFC with no paperwork or corporate resolutions supporting the transfer (TT818-819). He then went on to rent the Silver System through SFC (TT1122), while claiming that SFC had no responsibility to satisfy obligations of the Silver System (Ex 1028 at pages 57-58). Mr. Sandhaus freely ignored the separate corporate identities of SFC and DSPI (Ex 1050, 462-464, 20, 1044) and considered both corporations to have no identity separate from his own (TT 791, 908, 1149). The alter ego doctrine, as set forth in *Oriental Commercial v. Rossell* 609 F.Supp. 75, 78 (SDNY 1985), clearly applies in this case:

> "To apply alter ego doctrine to justify the disregard of a corporate entity, the court must determine that there is such unity of interest and ownership that separate personalities of the corporations no longer exist, and that failure to disregard the corporate form would result in fraud or injustice." (Cf. *Gorrill vs. Icelandair/Flugleider* 761 F2d 847, 853 (2d Cir 1985); *Walter Heller & Co. v. Video Innovations* 730 F2d 50, 53-54 (2d Cir 1984); *Cooperstein v. Padricisn Estates* 499 NYS 2d 423 (AD 2 Sept 1986)

* * *

APPENDIX N — EXCERPTS OF DEPOSITION OF RICHARD SANDHAUS

* * *

[68] Productions, Inc. assigned its right, title or interest in that particular system to some other entity?

A. Yes.

Q. To whom was the right, title and interest to that system assigned?

A. Science Faction Corporation.

Q. Would you tell me the circumstances under which that assignment took place?

A. What do you mean, circumstances?

Q. How did it come about that the rights to this particular system were assigned by Dick Sandhaus Productions, Inc. to Science Faction Corporation?

A. I am the sole shareholder of both of those corporations, and I made a decision somewhere in the middle of '78 to establish the corporation called Science Faction Corporation. That would deal only in the area of laser display and laser related businesses while concurrently, I was operating the previous existing corporation, Dick Sandhaus Productions, Inc. for otherwise unrelated things in the area of radio production and syndication, things like that. And in order to keep projects totally discrete from one another and to simplify bookkeeping and all kinds of things, I just separated the areas of business that were unrelated to each other.

Appendix N

[69] Q. For purposes of bookkeeping, did you assign an asset value to this system when you made the transfer?

A. Yes.

Q. What was that value?

A. I can't remember what it was, but it was determined just by looking at all of the individual cost items that Dick Sandhaus Productions had incurred in producing the system, which would be material costs, component costs, payroll costs.

Q. Did you have this particular asset value memorialized in some fashion in any of your books that you kept?

A. I am not sure what you mean by "memorialized." If you are asking me how it was sort of kept in the way of bookkeeping?

Q. Was it reduced to writing in any form in any of your corporate books?

A. Well, I don't think there was some specific document that refers to this and only this, but I can tell you that the manner of bookkeeping was like an exchange item between the two corporations, and had to do with the fact that there was office space that was leased by Dick Sandhaus Productions which was also used by Science Faction Corporation, so that there were a number of things that [70] Science Faction started directly paying for, things like office space, and so just those things were just kept track of and numbers were exchanged.

Q. Is it your testimony, then, that Science Faction established a debt to Dick Sandhaus Productions, Inc. and this asset was transferred over in lieu of that debt?

Appendix N

MR. KLEINBAUM: I am not sure that is what his testimony is.

MR. SANDBACK: That's what I am trying to find out.

MR. KLEINBAUM: I don't think there was a characterization.

Just answer the question.

A. I don't really know the technically correct answer. Very simply, there were —

MR. KLEINBAUM: Answer the question, if you know the answer.

A. Science Faction paid for things that Dick Sandhaus benefited from in effect for exchange for the asset value of that Silver System.

Q. For purposes of bookkeeping, you must have known at that point in time how much you were setting off one against the other; is that true?

* * *

APPENDIX O — EXCERPTED JANUARY 11, 1994 TRIAL TRANSCRIPT (ADMISSION OF EXHIBITS)

(Sandhaus - direct)

[631] MR. KLEINBAUM: If your Honor pleases, may I just look at them for a minute?

THE COURT: Yes.

MR. KLEINBAUM: And ask Mr. Sandhaus to look at them as well?

THE COURT: No. You look at them and tell me whether or not there is any objection to their entry.

All right, they are admitted subject to a motion to strike.

MR. KLEINBAUM: Motion to strike. The documents here listed as affidavits because the witness is on the stand and these would be inappropriate documents.

THE COURT: 6 is admitted.

MR. KLEINBAUM: Excuse me?

THE COURT: 18 and 19 are admitted. 21 is admitted, 22, 23, 24, 26.

MR. MARTIN: Did you get 25, your Honor?

THE COURT: You didn't offer it.

MR. MARTIN: Right. I'm sorry.

Appendix O

THE COURT: 31 is admitted, 34.

Tell me what 34 through 132 are.

MR. MARTIN: They are itinerary reports sent by Mr. Sandhaus to the Bureau of Radiological Health informing them that a laser light show will be performed at a certain location on a certain date. Each of them is a separate [632] report.

THE COURT: Is there any identification as to the time and unit?

MR. MARTIN: Yes, there is.

THE COURT: They will be admitted.

(Plaintiff's Exhibits 6, 18, 19, 21, 22, 23, 24, 25, 26, 31, 34 through 132, 133 through 137, 168 through 199, 202, 204, 315, 318 through 321, 324 through 441, 443 through 449, 458, 460 and 461, 1018 through 1031 for identification were received in evidence)

THE WITNESS: It is not actually true that there was such identification as to product.

THE COURT: 133 is admitted, 134, 135.

MR. KLEINBAUM: Your Honor, may I reserve the right to strike with respect to 137?

THE COURT: Yes, you can reserve until the cows come home.

136, 137, 168 through 199, 202, 203, 204 isn't evidence, but I will take it.

315, I will take, 318, 319, 320, 321.

I take it that 324 through 441 — boy, are you going to have a nice time on appeal with this record?

324 through 441 are similarly —

MR. MARTIN: Those are contracts that were provided in discovery for shows, rental shows, for, in most [633] cases, rental shows, sales contracts.

THE COURT: All right. 433 through 449 are admitted.

MR. KLEINBAUM: Did your Honor mention 443 through 449?

THE COURT: Yes.

MR. KLEINBAUM: Your Honor, I move to strike on the ground that the witness is here and these affidavits, having been made prior to this case. He is here, subject to examination. I don't believe they are admissible under Rule 803.

THE COURT: 458 is admitted. The motion is denied. 460, 461 are admitted. 1018 through 1031 are admitted.

MR. MARTIN: Your Honor, there is one additional exhibit —

MR. KLEINBAUM: I also call your attention, your Honor,

to Exhibits 315, 318, and 319. They are responses to requests for admissions. We reserve all our rights as we reserved them in the documents.

MR. MARTIN: No objection.

I have one more.

BY MR. MARTIN:

Q. Exhibit 1042, could I just ask you to identify this, Mr. Sandhaus?

* * *

APPENDIX P — EXCERPTED JANUARY 13, 1994 TRIAL TRANSCRIPT

(Sandhaus - cross)

* * *

[1116] then at some point SFC began paying the rent.

THE COURT: Interchangeably, right?

THE WITNESS: No. There was a point at which it changed and then it continued to be that way.

BY MR. MARTIN:

Q. In fact, Mr. Sandhaus, DSPI didn't pay any rent from June 1, 1979, through May 31, 1980, isn't that right?

A. That —

Q. Let me refresh your recollection your recollection by showing you —

A. That could well be true.

Q. Let me show you what has been marked 1050 for identification, the corporated tax return for DSPI for the period June 1, 1979, through May 31, 1980.

MR. KLEINBAUM: What exhibit number is that?

MR. MARTIN: 1050.

Appendix P

Q. Do you recognize that?

MR. KLEINBAUM: Have you previously marked that?

THE COURT: No.

MR. MARTIN: No, this is new.

THE COURT: That is a tax return, is it, for?

MR. MARTIN: DSPI.

Q. First of all, is this the tax return for DSPI for that period?

THE COURT: I'm sorry. I missed the period.

[1117] A. I'm not certain because there don't appear to be signatures on this.

MR. KLEINBAUM: What year is that?

MR. MARTIN: June 1, 1979, through May 31, 1980.

Q. Wasn't this produced in discovery as the —

A. I don't recall. Oh, I see. The Xerox says "Copy" on it.

MR. KLEINBAUM: Is this a copy of the return?

MR. MARTIN: That's it, yes.

MR. KLEINBAUM: Maybe that will help you.

MR. MARTIN: No, this is Science Factions, unless it is attached.

THE WITNESS: No, it is not.

MR. MARTIN: I offer this 1050 in evidence.

THE COURT: Admitted.

(Plaintiff's Exhibit 1050 for identification was received in evidence)

BY MR. MARTIN:

Q. Mr. Sandhaus, does 1050 refresh your recollection as to whether DSPI paid any rent during that period?

A. Yes, it refreshes my recollection.

Q. It didn't?

A. There is nothing listed at the line "Gross rents" so it tells me that.

THE COURT: I suppose you would like to have it [1118] admitted.

MR. MARTIN: Didn't I offer it?

THE COURT: Maybe you did.

MR. MARTIN: Let me offer 1050.

THE COURT: It is admitted.

BY MR. MARTIN:

Q. You testified earlier about a contract that Science Faction entered into with Aucoin Management concerning the Kiss project?

A. I don't recall if I testified about it. I am familiar with the project.

Q. Let me show you a document marked 1018 for identification.

MR. KLEINBAUM: Has that been produced?

MR. MARTIN: Yes, it has.

BY MR. MARTIN:

Q. I ask you if you can identify that document.

A. Yes. It lacks my signature, but it is signed by Aucoin Management. It is an agreement between Kiss/Aucoin Management Inc. and SFC.

Q. Under the contract, Science Faction was to design and build a system and to perform certain —

MR. KLEINBAUM: Objection, your Honor.

THE COURT: Sustained.

Appendix P

Q. What were Science Factions obligations under the

* * *

APPENDIX Q — LIST OF PLAINTIFF'S TRIAL EXHIBITS

TABLE OF CONTENTS

Page

Plaintiff's Trial Exhibits

Volume I

1 Letter from Weinreich to DSPI, dated April 18, 1978 (1978 Letter) Ex 001

3 Letter from Xenon to SFC, dated September 11, 1978 Ex 002

7 Affidavit of Richard Sandhaus in support of motion for summary judgment, sworn to September 18, 1990 Ex 004

9 DSPI disbursements for 1977-79 Ex 009

10 SFC disbursements for 1978-79 Ex 015

11 SFC Revenues for 1978-79 Ex 034

17 Schedule of Income for 2000 Series Ex 050

20 Science Faction Product Brochure Ex 076

40 Letter from SFC to BRH dated October 12, 1983 (Market Square Arena) Ex 080

41 Letter from SFC to BRH (date illegible) (Greenville South Carolina) Ex 081

Appendix Q

42 Letter from SFC to BRH dated November 16, 1983 (Times Square) Ex 082

44 Letter from SFC to NCDRH dated December 1, 1983 (Times Square) Ex 083

45 Letter from SFC to NCDRH dated December 20, 1983 (Sheraton Centre Ballroom) Ex 084

46 Letter from SFC to NCDRH dated February 1, 1984 (Green Valley Country Club) Ex 085

48 Letter from SFC to NCDRH dated February 22, 1984 (Sheraton Washington) Ex 086

49 Letter from SFC to NCDRH dated March 12, 1984 (Grand Hyatt Hotel) Ex 087

50 Letter from SFC to NCDRH dated March 14, 1984 (Radisson High Point) Ex 088

51 Letter from SFC to NCDRH dated March 14, 1984 (The Limited, Inc.) Ex 089

52 Letter from SFC to NCDRH dated March 20, 1984 (The Rand Building) Ex 090

53 Letter from SFC to NCDRH dated March 23, 1984 (Tammy Brook Country Club) Ex 091

54 Letter from SFC to NCDRH dated May 1, 1984 (Harborfront Park) Ex 092

Appendix Q

55 Letter from SFC to NCDRH dated May 11, 1984 (Chicago Downtown Marriott) Ex 093

56 Letter from SFC to NCDRH dated June 5, 1984 (Georgia World Congress Center) Ex 094

57 Letter from SFC to NCDRH dated June 5, 1984 (Hoosier Dome) Ex 095

58 Letter from SFC to NCDRH dated September 7, 1984 (Radio City Music Hall) Ex 096

59 Letter from SFC to NCDRH dated September 28, 1984 (Starret City) Ex 097

60 Letter from SFC to NCDRH dated October 2, 198 (Bonaventure Hotel) Ex 098

61 Letter from SFC to NCDRH undated (Hyatt Regency Chicago) Ex 099

62 Letter from SFC to NCDRH dated October 16, 1984 (Eastern Michigan University) Ex 100

63 Letter from SFC to NCDRH dated October 18, 1984 (Clemson University Ampitheatre) Ex 101

64 Letter from SFC to NCDRH dated October 17, 1984 (Waverly Hotel Galleria Parkway) Ex 102

104 Letter from SFC to NCDRH (date illegible) (Potomac Riverfest) Ex 103

Appendix Q

105 Letter from SFC to NCDRH dated June 6, 1986 (Grand Hyatt Hotel) Ex 104

106 Letter from SFC to NCDRH dated June 20, 1986 (State Street, Rockford) Ex 105

107 Letter from SFC to NCDRH dated July 18, 1986 (Faneuil Hall) Ex 106

108 Letter from SFC to NCDRH dated August 4, 1986 (USS Intrepid) Ex 107

110 Letter from SFC to NCDRH dated September 10, 1986 (Bayfront Convention Center) Ex 108

111 Letter from SFC to NCDRH dated October 21, 1986 (Kaufman's Pittsburgh) Ex 109

112 Letter from SFC to NCDRH dated October 24, 1986 (Moorestown Mall) Ex 110

113 Letter from SFC to NCDRH dated October 27, 1986 (Alexis Park Hotel) Ex 111

114 Letter from SFC to NCDRH dated October 30, 1986 (The Palladium, New York) Ex 112

115 Letter from SFC to NCDRH dated October 27, 1986 (Smith Haven Mall) Ex 113

117 Letter from SFC to NCDRH dated November 18, 1986 (The Plaza at Liberty Center) Ex 114

Appendix Q

119 Letter from SFC to NCDRH dated December 30, 1986 (New York) Ex 115

134 Letter from SFC to BRH dated July 27, 1981 (supplementary product information) Ex 116

135 Affidavit of Richard Sandhaus sworn to September 21, 1988 Ex 117

170 Unsigned document purporting to be an agreement between Levitan Design Associates, Inc. and Science Faction Corporation Ex 120

312 Report of Consultant Leo Beiser "Evolution of Laser Projection Systems," dated April 30, 1993 Ex 138

313 Letter from Stephen Weinreich to Dick Sandhaus dated December 7, 1978 Ex 183

315 Defendants' Response to Plaintiff's Requests for Admissions Ex 184

320 Partially executed purported agreement between SFC and Black & Decker (U.S.), Inc., dated June 14, 1984 Ex 206

344 Unsigned purported rental agreement between SFC and Grand Illusions, dated January 16, 1984 Ex 213

353 Unsigned purported letter from SFC to C. Henning Studios, dated May 10, 1984 Ex 215

Appendix Q

Volume II

354 Unsigned purported letter from SFC to Melvin Simon Associates, dated May 18, 1984 Ex 224

355 Unsigned purported letter from SFC to C. Henning Studios, dated June 4, 1984 Ex 235

401 Unsigned purported letter from SFC and Staging Inc., dated June 26, 1986 Ex 246

405 Unsigned purported letter from SFC to Bayfest Inc., dated August 28, 1986 Ex 256

406 Unsigned purported letter from SFC to Kaufmann's dated September 18, 1986 Ex 267

407 Unsigned purported letter from SFC to P.C. Magazine, dated October 22, 1986 Ex 278

408 Unsigned purported letter from SFC to Smith Haven Mall, dated October 27, 1986 Ex 289

409 Letter from SFC to The Palladium, dated October 31, 1986 Ex 299

410 Unsigned purported letter from SFC to Grant Liberty Development Group Associates, dated November 4, 1986 Ex 306

436 Unsigned purported agreement for purchase of Laserchaser 2 system, between SFC and Solid Intertain, dated May 7, 1987 Ex 317

Appendix Q

437 Purchase and sale and license agreement for the Bayfront Park Laser Light Projection System, between SFC and the City of Miami, dated December 7, 1988 Ex 324

438 Unsigned purported purchase and sale agreement between SFC and Busch Entertainment Corporation, dated April 11, 1986 Ex 355

* * *